Supreme Court, U.S.
FILED

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

KINGSTON CONSTRUCTORS INC.

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Respondent.

Petition for Writ of Certiorari
To the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

Ronald K. Losch,
Attorney for Petitioner
KINGSTON CONSTRUCTORS INC.

30pp

QUESTIONS PRESENTED

The Washington Metropolitan Area Transit Authority ("WMATA") Compact, Section 81 provides:

> The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against [WMATA] and to enforce subpoenas issued under [the WMATA Compact]. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

The courts of California have held this language prohibits the courts of all states, except those of Maryland and Virginia, from exercising any jurisdiction over actions involving WMATA. The questions presented here are:

> Can the language of Section 81 of the WMATA Compact impliedly strip jurisdiction, with respect to WMATA, from the courts of all states except Maryland and Virginia or must the Compact expressly do so?

> Do the Constitution and laws of the United States allow Congress, through the compact process, to place states' judiciaries upon an unequal footing?

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PETITION FOR WRIT OF CERTIORARI

Kingston Constructors Inc. ("Kingston"), respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of California, entered on January 9, 1997, to determine a question regarding the validity, interpretation, and application of a statue of the United States, i.e., WMATA Compact, Section 81, (Pub.L. No. 89-774 (Vol. 6, 1966) § 1, 80 Stat.)

A LIST OF ALL PARTIES TO THE PROCEEDING, INCLUDING PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Power Energy Industries

Kingston Constructors Inc.

Washington Metropolitan Area Transit Authority

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

Default Judgment, California Superior Court, County of Los Angeles, Case No. BC056254, Entered on May 5, 1994

Order Vacating Default Judgment, California Superior Court, County of Los Angeles, Case No. BC056254, Entered on September 1, 1994

Opinion, Division Two of the Second Appellate District of the Court of Appeal of California, Entered on April 3, 1996,

Opinion, Supreme Court of California, Case No. S053577, Entered on January 9, 1997

JURISDICTION IN THIS COURT

On January 9, 1997, the Supreme Court of California held that the courts of the State of California have no jurisdiction over WMATA.

Such a decision being a final decree rendered by the highest court of the State of California in which a decision could be had, the jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257.

Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of January 9, 1997, the date upon which the opinion of the California Supreme Court was entered by the clerk thereof.

CONSTITUTIONAL PROVISIONS AND STATUTES, INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION -- ARTICLE ONE

Section 10. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

UNITED STATES CONSTITUTION -- ARTICLE THREE

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other

cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

UNITED STATES CONSTITUTION --ARTICLE FOUR

Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, But shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

BILL OF RIGHTS -- ARTICLE TEN

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

BILL OF RIGHTS -- ARTICLE ELEVEN

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or subjects of any foreign State.

28 U.S.C. 1446

> (a) A defendant or defendants desiring to remove any civil action ... from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice or removal ...
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading ....

AN ACT FOR THE ADMISSION OF THE STATE OF CALIFORNIA INTO THE UNION

> Whereas the people of California have presented a constitution and asked admission into the Union, which constitution was submitted to Congress by the President of the United States, by message dated February thirteenth, eighteen hundred and fifty, and which, on due examination is found to be republican in its form of government:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of California shall be one, and hereby declare to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

. . . .

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY COMPACT, ARTICLE XVI - JURISDICTION OF COURTS - SECTION 81

The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by . . . .

STATEMENT OF THE CASE

WMATA is an interstate compact agency created by agreement between Congress and the States of Maryland and Virginia pursuant to the Washington Metropolitan Area Transit Authority Compact ("the Compact") by Public Law No. 89-774 (1966) 80 Stat. 1324.

WMATA owns and operates a light rail system in the area of the District of Columbia.

In or about October, 1990, WMATA invited bids for a contract to replace certain transformers used in the WMATA light rail system.

WMATA and Kingston entered into a contract whereby Kingston was to supply and install the replacement transformers. Power Energy Industries (hereinafter "PEI") entered into a contract with Kingston in Los Angeles County, California, to design and manufacture the replacement transformers. PEI's sales office and manufacturing facility were at all times located in Los Angeles County, California.

Subsequently, disputes arose over the performance of the transformers, WMATA's demands for additional testing, WMATA's refusal to allow installation of the transformers, and WMATA's demands for other performance not specified in the contract. WMATA directed Kingston to terminate the PEI/Kingston contract and refused to pay for the transformers delivered by PEI.

On May 28, 1992, when it became apparent PEI would not receive payment for the transformers which had been completed and delivered, PEI filed suit. The complaint named Kingston and WMATA as defendants. WMATA was served with the Complaint.

The PEI complaint asserted tort claims against WMATA for inducing breach of contract, and interference with an advantageous business relationship.

On July 24, 1992, WMATA's General Counsel sent a letter addressed to Mr. James H. Dempsey, Clerk of the Superior Court for the County of Los Angeles, which stated that WMATA would not enter an appearance in the case. A copy of this letter was sent to PEI's attorney of record.

PEI's attorney immediately wrote to WMATA's attorney, advising him that such a letter was not an appropriate response to the Complaint, and further advising that if no appropriate response was filed, WMATA's default would be taken.

On August 4, 1992, a copy of a Request for Entry of Default was mailed to WMATA's Managing Director. The Clerk entered a default on October 19, 1992.

On December 22, 1993, after settlement discussions conducted by The Honorable Harvey A. Schneider, Judge, Superior Court for the County of Los Angeles, a settlement agreement was entered into between PEI and Kingston, and approved by the Superior Court whereby, among other things, the PEI chose in action against WMATA was assigned to Kingston.

On May 5, 1994, the Superior Court entered a default judgment against WMATA.

Thereafter Kingston sought to enforce the judgment. In September, 1994, only after Kingston expended considerable effort locating attachable assets, and having located WMATA assets in California, WMATA moved to vacate the default judgment and to quash service of summons, asserting a lack of both personal and subject matter jurisdiction. In that same motion, WMATA also sought a modification of the judgment entered below to reduce the amount of the judgment and to eliminate attorney's fees from the judgment. After a hearing, the trial court granted WMATA's motion, finding a lack of subject matter jurisdiction. The trial court did not reach the issues of personal jurisdiction or address the issue of whether the judgment should be modified. Thereafter, Kingston brought a Motion for Reconsideration pursuant to California Code of Civil Procedure § 1008, which the Superior Court denied on October 14, 1994.

Kingston then appealed the order vacating the default judgment to Division Two of the Second Appellate District of the Court of Appeal of California. The Court of Appeal affirmed the trial court's order that the default judgment be vacated on the grounds that the trial court lacked subject matter jurisdiction.

Kingston then petitioned the California Supreme Court for review. The California Supreme Court granted review and affirmed the judgment of the Court of Appeal, holding that state courts, except those of Maryland and Virginia, had no jurisdiction over actions involving WMATA.

Consideration of Federal Questions in the Courts Below

The Trial Court

The California Superior Court concluded that the Compact creating WMATA prohibits the filing of a suit against WMATA in any state court except those of Maryland and Virginia. The Superior Court reasoned:

> The only evidence that the Compact intended that there be jurisdiction in any other state is the removal statute itself. Interpreting the removal provision to apply solely to the state actions brought in Maryland and Virginia, however, has the virtue of reading the Section in a tight and consistent manner.
>
> Read this way, the phrase "any such action initiated in a state court" refers specifically to those actions identified in the previous sentence in which a litigant chooses to bring in the state courts of either Maryland or Virginia. This reading also has the virtue of limiting jurisdiction in state courts only in those courts which signed the Compact and through which the transit system runs. Under these circumstances, such a jurisdictional accommodation is plausible.

In commenting upon the language of the Compact which limited jurisdiction over WMATA actions to the state courts of only Maryland and Virginia, Judge Schneider noted:

> I would be less than candid if I did not tell you that that is a less than clear expression of

congressional will.

The Trial Court did not address the question of the unequal grant of judicial authority, and whether Congress could exclude the California courts (and the courts of 48 other States) from hearing actions against WMATA.

The California Court of Appeal

The California Court of Appeal affirmed the trial court's order, holding that the trial court properly vacated the default judgment based on lack of subject matter jurisdiction.

The Court of Appeal reasoned:

> . . . the Compact refers to original jurisdiction in the same sentence as the reference to the two states, which leads to the conclusion that Congress intended State jurisdiction to be limited to Maryland and Virginia. We agree that conferring original jurisdiction without more does not confer exclusive jurisdiction, or divest state courts of their concurrent jurisdiction, and we agree with the trial court that the language of the Compact could have been clearer. There is more in the Compact, however. To find that there is concurrent jurisdiction in all state courts would make superfluous the mention of two specific states. Thus, even if the Compact does not clearly, explicitly confer jurisdiction on the federal district courts, and the two state courts, it impliedly does so. *Kingston Constructors Inc. v. WMATA*, 49 Cal.App.4th 257, 262, (1996).

The California Court of Appeal also dismissed the contention that a preemption of the historic powers of the states requires unmistakably clear expression of intent.

The California Supreme Court

The California Supreme Court affirmed the judgment of the Court of Appeal, holding that:

> . . . section 81 of the WMATA Compact impliedly denies jurisdiction of WMATA actions to the courts of states other than Maryland and Virginia -- more precisely, it impliedly denies them original jurisdiction. It explicitly includes Maryland and Virginia courts. It thereby implicitly excludes the rest. *Expressio duroru, exclusio ceterorum.* The WMATA Zone does not embrace territory belonging to any of the other states. As a result, it does not encompass geographical area within which their courts could properly exercise judicial power.

The California Supreme Court concluded that the restriction of jurisdiction to the courts of the United States and to those of Maryland and Virginia, was valid pursuant to Congress' power under article I, section 8, Clause 17 of the United States Constitution to legislate over the District of Columbia as the Seat of the Government of the United States, and Congress' power under article I, section 8, clause 3 of the United States Constitution to regulate Commerce among the several states.

The California Supreme Court dismissed Kingston's contentions that the selective grant of jurisdiction to the

states of Maryland and Virginia was unconstitutional on the grounds that (1) the District of Colombia was included as a state, (2) the law was beyond the power of Congress, and (3) that such a grant of selective jurisdiction invidiously discriminated in favor of Maryland and Virginia and against the other states. Neither the Court of Appeal nor the California Supreme Court addressed the unequal footing of the state courts caused by the Compact.

REASONS FOR GRANTING THE WRIT

I. THE CALIFORNIA SUPREME COURT'S OPINION IS CONTRARY TO THE REQUIREMENT OF AN EXPRESS STATEMENT OF LEGISLATIVE INTENT WHEN DIVESTING STATES' COURT'S OF JURISDICTION.

The California Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court. The California Supreme Court has decided that Congress, through the compact process, may alter the balance of power among the various states of the union, without a clear expression of intent.

The California Supreme Court concluded that the restriction of jurisdiction to the courts of the United States and to those of Maryland and Virginia, was a valid exercise of congressional power. This finding resulted in the Court's determination that Congress could, through the compact process, grant or withhold powers to states on a selective basis. The California Supreme Court employed a six step analysis in reaching its conclusion. The California Supreme Court found the fifth step in its analysis the most critical, stating that because section 81 of the WMATA Compact

explicitly included Maryland and Virginia courts, it implicitly excluded the rest, relying upon the Latin maxim, "*Expressio duorum, exclusio ceterorum.*" Both the California Appellate Court and California Supreme Court decisions rest on the premise that a statue can impliedly divest state Courts of jurisdiction.

The California Supreme Court acknowledged that a presumption exists that state courts enjoy concurrent jurisdiction with federal courts, citing *Gulf Offshore Co. v. Mobil Oil Corp.* 453 U.S. 473, 478 [69 L.Ed.2d 784, 101 S.Ct. 2870] (1981). Then, the California Supreme Court, dismissed this requirement, because the language of Section 81 of the WMATA Compact was not totally silent as to state court jurisdiction. In the words of the California Supreme Court:

> Under *Yellow Freight System, Tafflin, Gulf Offshore Co.*, and *Dowd Box Co.*, there is indeed a "presumption of concurrent jurisdiction" between federal courts and state courts. . . . But that presumption arises *when the jurisdiction provision in question is silent as to the jurisdiction of state courts.* That is not the case here. (Emphasis included in original text.)

Thus, the courts with presumed concurrent jurisdiction, Virginia and Maryland, were explicitly mentioned, while those being divested of presumed concurrent jurisdiction were alluded to by implication only.

This Court has consistently held that altering the traditional rights of states calls for an express declaration. As was set forth in *Welch v. Texas Department of Highways and*

Public Transportation, 483 U.S. 468, 477 (1987):

> . . . the constitutional role of the States sets them apart from other employers and defendants. As the dissenting opinion in *Parden* states:
>
> > It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense.

In *Welch v. Texas*, ibid, an employee of the Texas Highways Department was injured while working on a ferry dock operated by the Department. She filed suit against the Department and the State under § 33 of the Jones Act, which provides that any seaman injured in the course of his employment may maintain an action for damages at law in federal district court, and which, in effect, applies the remedial provisions of the Federal Employer's Liability Act (FELA) to such suits. The District Court dismissed the action as barred by the Eleventh Amendment and the Court of Appeals affirmed. Although recognizing that *Parden v.*

Terminal Railway of Alabama Docks Dept., 377 U.S. 184 (1964), held that an employee of a state-operated railroad may bring an FELA action in federal court, the Court of Appeals held that the decision was inapplicable in light of Congress' failure to include in the Jones Act an unmistakably clear expression of its intention to abrogate the States' Eleventh Amendment immunity from suit in federal court. The court also held that Texas had not consented to being sued under the Jones Act. This Court affirmed.

Requiring a clear expression of congressional intent serves a twofold purpose. First, it removes any ambiguity with respect to the interpretation and application of the statute among the several states. Secondly, it provides the various members of congress with a uniform understanding of the legislation's impact.

As stated in the Federalist, No. 82:

> . . . the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.
>
> . . . .
>
> and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth.

In this case, the statutory language reserving power to the judiciary of two states, while divesting others, is the type of invasion of well established constitutional principles that demand an unmistakably clear expression of congressional intent.

II. THE CALIFORNIA SUPREME COURT'S OPINION VIOLATES THE PRINCIPAL THAT THE STATES REMAIN EQUAL IN DIGNITY AND POWER.

The California Supreme Court held that the selective grant of jurisdiction of WMATA actions only to the courts of the United States and to the courts of Maryland and Virginia did not violate the United States Constitution. [1]

This holding, that Congress could selectively deny jurisdiction to some state courts leads to the premise that the California Supreme Court would accept the notion that Congress could grant jurisdiction over a specific issue to 49 states to the exclusing on one, or grant jurisdiction to all states south of the Mason Dixon lient to the exclusion of all other states.

In 1850, California was admitted as a State to the Union "on an equal footing with the original States in all respects whatever." 9 Stat. 452. *California v. United States,* 438 U.S. 645, (1978)

The Federal Government cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution. *Pollard's Lessee v. Hagan*, 3 How. 212 (1845).

1

This inequality of power among states, and congressional discrimination among states admitted to the union on an equal footing has no more place within our constitutional structure than the 1820 Missouri Compromise which attempted to establish that new states would be admitted in pairs, one slave and one free.

As this Court explained in *Coyle v. Smith*, 221 U.S. 559 (1911):

> In *Texas v. White*, 7 Wall. 700, 725, late Chief Justice Chase said in strong and memorable language that, "the Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States."

Citing *Lane County v. Oregon*, 7 Wall. 76, late Chief Justice Chase explained:

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union, there could be no such political body as the United States.
>
> To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears, we may remain a free people, but the Union will not be the Union of the Constitution.

The argument that Congress derives from some other source the power to impose restrictions upon a State which deprives it of equality with other members of the Union, has no merit, and ". . . there is to be found no sanction for the contention that any State may be deprived of any of the power constitutionally possessed by other States, as States." *Coyle v. Smith*, id.

James Madison, in the year 1819, speaking with reference to the prohibitory power claimed by Congress, then threatening the very existence of the Union, remarks of the language of the second clause of the third section of article fourth of the Constitution:

> As to the power of admitting new States into the Federal compact, the questions offering themselves are whether Congress can attach conditions, or the new States concur in conditions, which after admission would abridge or enlarge the constitutional rights of legislation common to other States; whether Congress can, by a compact with a new State, take power either to or from itself, or place the new member above or below the equal rank and rights possessed by the others; whether all such stipulations expressed or implied would not be nullities, and be so pronounced when brought to a practical test. It falls within the scope of your inquiry to state the fact that there was a proposition in the convention to discriminate between the old and the new States by an article in the Constitution. The proposition, happily, was rejected. The effect of such a discrimination is sufficiently evident. *Scott v. Sandford*, 60

U.S. 393 (1856), DANIEL, Separate Opinion

Equality of constitutional right and power is the condition of all the States of the Union, old and new. *Coyle v. Smith*, 221 U.S. 559 (1911).

In Federalist No. 81, the founders cautioned against limiting actions to state tribunals where "local spirit" might sway justice:

> . . . the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union.

CONCLUSION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

Statutory language which reserves power to the judiciary of two states, while divesting others is the type which requires a clear expression of congressional intent to remove any ambiguity with respect to the interpretation and application of the statute, among the several states, and provide the various members of congress with a uniform understanding of the legislation's impact.

In this case, the statutory language reserving power to the judiciary of two states, while divesting others, is the type on invasion of well-established constitutional principles that demand an unmistakably clear expression of congressional

intent.

The judges in the trial court and in the Court of Appeal all agreed that the language of the Compact was not clear. Under this circumstance alone, the Compact should be sent back to Congress for clarification. Notwithstanding other constitutional questions of equal footing, The California Supreme Court has held that the language of the compact only implies what must be explicit and clear.

Even if clear, such legislation is not permissible under the "equal footing" doctrine which demands that equality of constitutional right and power is the condition of all the States of the Union. The selective grant of jursidiction to only the courts of identified states mocks the efforts and lives expended in preserving a union of equal states with republican forms of government.

Respectfully submitted,

Ronald K. Losch
Attorney for Petitioner
Kingston Constructors Inc.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

KINGSTON CONSTRUCTORS INC.

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Respondent.

Appendix to
Petition for Writ of Certiorari
To the Supreme Court of California

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Ronald K. Losch,
Attorney for Petitioner
KINGSTON CONSTRUCTORS INC.

83 pp

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App. 1

Clerk's Default, California Superior Court, County of Los Angeles, Case No. BC056254, Entered on October 19, 1992

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): (213) 688-7795 TELEPHONE NO.:
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1000 WILSHIRE BOULEVARD, SUITE 650
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LOS ANGELES, CA 90017
ATTORNEY FOR (Name): Plaintiff

FOR COURT USE ONLY

Insert name of court and name of judicial district and branch court, if any:
SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
CENTRAL DISTRICT

PLAINTIFF: POWER ENERGY INDUSTRIES, a California corporation,

DEFENDANT: KINGSTON CONSTRUCTORS, INC., a corporation, etc., et al.

FILED
OCT 19 1992
By CAROL L. BLAIR, DEPUTY

CASE NUMBER: BC056254

REQUEST FOR ☒ ENTRY OF DEFAULT ☐ CLERK'S JUDGMENT
☐ COURT JUDGMENT

1. TO THE CLERK: On the complaint or cross-complaint filed
   a. on (date): May 28, 1992
   b. by (name): Power Energy Industries
   c. ☒ Enter default of defendant (names):
   Washington Area Metropolitan Transit Authority, a corporation
   d. ☐ I request a court judgment under CCP 585(b) (c) 989, etc. (Testimony required. Apply to the clerk for a hearing date unless the court will enter a judgment on an affidavit under CCP 585(d).)
   e. ☐ Enter clerk's judgment
      (1) ☐ for restitution of the premises only and issue a writ of execution on the judgment. CCP 1174(c) does not apply. (CCP 1169)
      (2) ☐ under CCP 585(a). (Complete the declaration under CCP 585.5 on the reverse.)
      (3) ☐ for default previously entered on (date):

2. Judgment to be entered

	Amount	Credits Acknowledged	Balance
a. Demand of complaint	$	$	
b. Statement of damages (CCP 425.11) (superior court only)*			
(1) Special	$	$	
(2) General	$	$	
c. Interest	$	$	
d. Costs (see reverse)	$	$	
e. Attorney fees	$	$	
f. TOTALS	$	$	

3. Daily damages were demanded in complaint at the rate of: $ per day beginning (date):

Date: August 4, 1992

JULIAN A. POLLOK
(TYPE OR PRINT NAME)

(SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

*Personal injury or wrongful death actions only.

FOR COURT USE ONLY
(1) ☐ Default entered as requested on (date): OCT 19 1992
(2) ☐ Default NOT entered as requested (state reason):

By:

(Continued on reverse)

Form Adopted by the Judicial Council of California 982(a)(9) [Rev. July 1, 1988]

REQUEST FOR ENTRY OF DEFAULT

CCP 585-587

EXHIBIT E 12

SHORT TITLE: POWER ENERGY INDUSTRIES v. KINGSTON CONSTRUCTORS, INC., etc., et al.	CASE NUMBER: BC056254

DECLARATION UNDER CCP 585.5 (Required for clerk's judgment under CCP 585(a))

3. This action
   a. ☐ is ☒ is not on a contract or installment sale for goods or services subject to CC 1801, etc. (Unruh Act).
   b. ☐ is ☒ is not on a conditional sales contract subject to CC 2981, etc. (Rees-Levering Motor Vehicle Sales and Finance Act).
   c. ☐ is ☒ is not on an obligation for goods, services, loans, or extensions of credit subject to CCP 395(b).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 4, 1992

JULIAN A. POLLOK . . . . . ▶ _____
(TYPE OR PRINT NAME OF DECLARANT) (SIGNATURE OF DECLARANT)

DECLARATION OF MAILING (CCP 587)

4. A copy of the foregoing request was
   a. ☐ not mailed to the following defendants whose addresses are unknown to plaintiff or plaintiff's attorney (names):

   b. ☒ mailed first-class, postage prepaid, in a sealed envelope to each defendant's attorney of record, or if none, to each defendant at defendant's last known address
      (1) on (date): 8/4/92 (2) to (specify names and addresses shown on the envelopes):

Managing Director
Washington Area Metropolitan Transit Authority, a corporation
600 Fifth Street, N.W.
Washington, D.C. 20001

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 4, 1992

BARBARA K. SEVITTS . . . . . ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

MEMORANDUM OF COSTS (Required if judgment requested)

5. Costs and disbursements are as follows (CCP 1033.5):
   a. Clerk's filing fees . . . . . $
   b. Process server's fees . . . . . $
   c. Other (specify): . . . . . $
   d. . . . . $
   e. TOTAL . . . . . $
   f. ☐ Costs and disbursements are waived.

I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

. . . . . ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

DECLARATION OF NONMILITARY STATUS

6. No defendant named above in item 1c is in the military service so as to be entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. Appen. § 501 et seq.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 4, 1992

JULIAN A. POLLOK . . . . . ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

EXHIBIT E 2/2

Default Judgment, California Superior Court, County of Los Angeles, Case No. BC056254, Entered on May 5, 1994

RONALD K. LOSCH - #98170
Attorney at Law
601 California Street, 21st Floor
San Francisco, California 94108
Telephone: (415) 956-8400

Attorney for Defendant
KINGSTON CONSTRUCTORS INC.

FILED
MAY - 5 1994
CLERK

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

POWER ENERGY INDUSTRIES, plaintiff, v, KINGSTON CONSTRUCTORS INC., et al., defendants.	Case No. BC068273 (Related to Case No. BC 056254)
AND RELATED CASE	DEFAULT JUDGMENT BY COURT (C.C.P. §585)

This case having been considered by the Honorable Harvey A. Schneider, Judge presiding in Department 52 of the above entitled court.

It appearing that defendant Washington Metropolitan Area Transit Authority having been regularly served with process, having failed to appear and answer plaintiff's complaint filed herein, and the default of this defendant having been duly entered on October 19, 1992; on application of plaintiff's successor in interest, Kingston Constructors Inc., to the court, and after having considered the evidence,

IT IS ORDERED that Kingston Constructors Inc. have and recovered judgment from the said defendant in the sum of

$6,934,758.00 damages; interest to the date hereof in the amount of $259,853.00; and attorney's fees in the sum of $50,655.00; together with interest on such judgment as provided by law.

Dated: May 5, 1994

Hon. Harvey A. Schneider
Judge, Superior Court
Los Angeles County

3 - 1994 Dist San Diego

MAY 12 1994 Dist San Francisco

000002

Order Vacating Default Judgment, California Superior Court, County of Los Angeles, Case No. BC056254, Entered on September 1, 1994

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 09/01/94 DEPT. 52

HONORABLE HARVEY A. SCHNEIDER JUDGE N DIGIAMBATTISTA DEPUTY CLERK

HONORABLE 7 JUDGE PRO TEM ELECTRONIC RECORDING MONI

E GERVIN/CSL Deputy Sheriff C ANDREWS Reporter

8:30 am BC068273
POWER ENERGY INDUSTRIES
VS
KINGSTON CONSTRUCTORS, INC

Plaintiff Counsel B. A. BROWN (X)

Defendant Counsel T. A. BEAUDET (X)
L. P. LUBKA (X)
R. K. LOSCH (X)
K. S. GELLER (X)

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, TO VACATE VOID JUDGMENT AND TO QUASH SERVICE OF SUMMONS OR TO MODIFY DEFAULT JUDGMENT BY VACATING AWARD IN EXCESS OF JURISDICTION; APPLICATION OF KENNETH S. GELLER TO APPEAR AS COUNSEL PRO HAEC VICE

Matter comes on for hearing and is argued.

The motion to vacate the default judgment as to Ramada only is granted.

The application of Kenneth S. Geller to appear as counsel pro haec vice is granted. Order is signed and filed this date.

Defendant is to give notice.

MINUTES ENTERED
09/01/94
COUNTY CLERK

Order Denying Motion for Reconsideration, Order Vacating Default Judgment, California Superior Court, County of Los Angeles, Case No. BC068273, Entered on September 1, 1994

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/14/94			DEPT. 52
HONORABLE: HARVEY A. SCHNEIDER	JUDGE	N DIGIAMBATTISTA	DEPUTY CLERK
HONORABLE: 13	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	C ANDREWS	Reporter

8:30 am	BC068273 POWER ENERGY INDUSTRIES VS KINGSTON CONSTRUCTORS, INC	Plaintiff Counsel	R. K. LOSCH (X)
		Defendant Counsel	T. A. BEAUDET (X) K. S. GELLER (X) B. A. BROWN (X)

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT AND JUDGMENT ASSIGNEE KINGSTON CONSTRUCTORS INC. FOR RECONSIDERATION OF ORDER VACATING JUDGMENT;

Matter comes on for hearing and is argued.

The motion for reconsideration is denied.

Notice is waived.

MINUTES ENTERED
10/14/94
COUNTY CLERK

Opinion, Division Two of the Second Appellate District of the Court of Appeal of California, entered April 3, 1996,

KINGSTON CONSTRUCTORS, INC. v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
49 Cal.App.4th 257; _ Cal.Rptr.2d __ [Apr. 1996]

[No. B088727. Second Dist. Div:, Two. Apr. 3, 1996.]

KINGSTON CONSTRUCTORS, INC., Plaintiff and Appellant, v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Defendant and Respondent.

COUNSEL

Ronald K. Losch for Plaintiff and Appellant.

Mayer, Brown & Platt, Kenneth S. Geller and Donald M. Falk, for Defendant and Respondent.

OPINION

NOTT, J.--Appellant Kingston Constructors, Inc. (Kingston) appeals from an order vacating a judgment that had been taken by default against respondent Washington Metropolitan Area Transit Authority (WMATA). The trial court concluded that it lacked subject matter jurisdiction over this case. We agree and affirm the order.

FACTS AND PROCEDURAL HISTORY

Our focus will be on subject matter jurisdiction, which does not require a long factual discussion. Therefore, we will briefly review the background facts.

WMATA is an interstate agency created by the United States Congress, Maryland and Virginia pursuant to the Washington

Metropolitan Area Transit Authority Compact (Compact). (Pub. L. No. 89-774 (Nov. 6, 1966) 80 Stat. 1324.) The principal purpose of WMATA, as stated in article II of the Compact, is to coordinate and implement transit systems within the Washington, D.C., metropolitan area. *(Id.,* at p. 1325.) WMATA neither maintains facilities nor operates transit systems outside the Washington, D.C., metropolitan area.

Kingston, a California corporation, entered into a contract with WMATA in 1991 to supply and install replacement transformers. Kingston, in turn, purchased the transformers from Power Energy Industries (PEI), another California contractor. WMATA was dissatisfied with the transformers and refused to pay for them.

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PEI sued Kingston and WMATA in Los Angeles County Superior Court in May 1992. Counsel for WMATA sent a letter to the clerk of the superior court stating that WMATA would not enter an appearance. PEI advised WMATA that the letter was not an appropriate response to the complaint, and warned that a default would be taken. Default was in fact entered on October 19, 1992.

On December 22, 1993, PEI and Kingston entered into a settlement agreement whereby PEI assigned its action against WMATA to Kingston. On May 3, 1994, Kingston was granted a default judgment against WMATA in the amount of $6,934,758 plus interest and attorney fees.

On August 12, 1994, WMATA filed a motion to vacate the judgment on the grounds that it was void for lack of personal and subject matter jurisdiction. WMATA relied on the language of the Compact to argue that Congress intended that suits by and against WMATA could be brought only in federal district courts in Maryland and Virginia, or the Maryland and Virginia state courts, and that removal to the federal court was limited to actions originally filed in the trial courts of those two states.

The pertinent language of the Compact is: "The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against [WMATA] ....
Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended. (28 U.S.C. 1446.)" (Pub. L. No. 89-774 (Nov. 6, 1966) 80 Stat. 1350.)

The trial court found that Congress's intent was not made clear in the Compact, but, citing federal case law, found itself obligated to construe a federal waiver of immunity narrowly. Thus, the trial court interpreted the language to limit jurisdiction as argued by WMATA and, as noted, the court granted the motion on the subject matter jurisdiction ground. This appeal followed.

CONTENTIONS

Kingston contends that (1) WMATA waived jurisdictional defects by failing to comply with Code of Civil Procedure section 418.10 and by filing a motion raising other issues, (2) the Compact waives sovereign immunity for proprietary actions, (3) the Compact does not limit state court jurisdiction, and (4) WMATA is estopped from raising a jurisdictional challenge.

We address the second and third contentions first.

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The Matter Was Correctly Dismissed for Lack of Subject Matter Jurisdiction

(1a) Kingston asserts that the Compact is a waiver of sovereign immunity from suit in contract. We agree, but we find that contention alone does not settle the question of whether the Compact confers concurrent jurisdiction on all states, including California. Therefore, we proceed directly to Kingston's third contention.

Kingston argues that the Compact does not limit state court jurisdiction. The first point made by Kingston is that state and federal courts have concurrent jurisdiction.

(2) Kingston is correct in stating the general rule that state courts may assume subject matter jurisdiction over a federal cause of action absent a provision by Congress to the contrary or "disabling incompatibility between the federal claim and state court." *(Gulf Offshore Co.* v. *Mobil Oil Corp.* (1981) 453 U.S. 473, 477 [69 L.Ed.2d 784,790-791, 101 S.Ct. 2870].) In considering the propriety of state-court jurisdiction over any particular federal claim, we begin with the presumption that state courts enjoy concurrent jurisdiction. (Id., at p. 478 [69 L.Ed.2d at p. 791].) Because Congress may confine jurisdiction to the federal courts either explicitly or impliedly, the presumption can be rebutted by an explicit statutory directive. It can also be rebutted by a clear incompatibility between state-court jurisdiction and federal interests. *(Ibid.)*

(lb) The provision at issue in *Gulf Offshore* granted the federal district courts "'original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf .... ' [Citation.]" (453 U.S. at p. 479 [69 L.Ed.2d at p. 791].) The argument in that case, however, was that state jurisdiction was incompatible with federal jurisdiction, an argument that was rejected by the court. Incompatibility is not the basis for WMATA's position of limited jurisdiction, thus, for other than its statement of the general rules of concurrent jurisdiction, *Gulf Offshore* is not controlling authority here.

Kingston also cites *Yellow Freight System, Inc. v. Donnelly* (1990) 494 LLS. 820, 824 [108 L.Ed.2d 834, 840, 110 S.Ct. 1566], which held that federal courts did not have exclusive jursdiction over title VII cases. The statute stated that "'[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.'" (Id., at p. 823 [108 L.Ed..2d at p. 839].) The court based its holding on the fact that the title VII provision, unlike a number of other statutes in which Congress

unequivocally stated that the jurisdiction of the federal courts is exclusive, contained no language expressly confining jurisdiction to the federal courts. *(Ibid.)*

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In this case, the Compact states (1) the federal district courts have original jurisdiction concurrent with the Maryland and Virginia courts of actions brought by or against WMATA, and (2) any action initiated in a state court shall be removable to the appropriate federal district court. Unlike *Donnelly,* here Congress was not silent on the question of the jurisdiction of the state courts. The Compact addresses concurrent jurisdiction, but limits it to the courts of only two states, Virginia and Maryland.

Kingston argues that the use of the phrase "original jurisdiction" in the Compact does not indicate that Congress intended to confer exclusive jurisdiction on those courts, citing *Brown v. Pitchess* (1975) 13 Cal.3d 518, 521 [119 Cal.Rptr. 204, 531 P.2d 772]. There, the question was whether California courts had jurisdiction over federal civil rights actions brought under 42 United States Code section 1983. Section 1983 did not address the question of jurisdiction, but the issue was governed by the general statute which conferred upon federal district courts original jurisdiction over any civil action. Thus, the federal civil rights statute was even more silent than the statute at issue in *Donnelly,* because section 1983 did not address the jurisdiction question at all. That being So, the California Supreme Court applied the general rule and found concurrent jurisdiction.

Once again, we must distinguish Kingston's authority. The Compact was not completely silent about jurisdiction, which would justify reliance on the general rule of concurrent jurisdiction as applied by the *Brown* court. Rather, the Compact refers to original jurisdiction in the same sentence as the reference to the two states, which leads to the conclusion that Congress intended state jurisdiction to be limited to Maryland and Virginia. We agree that conferring original jurisdiction without more does not confer exclusive jurisdiction, or divest state courts of their concurrent jurisdiction, and we agree with the trial court

that the language of the Compact could have been clearer. There is more in the Compact, however. To find that there is concurrent jurisdiction in all state courts would make superfluous the mention of two specific states. Thus, even if the Compact does not clearly explicitly confer jurisdiction on the federal district courts and the two state courts, it impliedly does so.

Kingston contests this last point, arguing that conferring jurisdiction on two states does not impliedly divest the other states of concurrent jurisdiction. Kingston again cites several authorities for the general proposition that states have concurrent jurisdiction unless that jurisdiction is excluded by Congress, quoting from The Federalist No. 82 (Hamilton) and *New York v. United States* (1992) 505 U.S. 144, 162-163 [120 L.Ed.2d 120, 141-142, 112 S.Ct. 2408].

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Kingston also quotes *Gregory v. Ashcroft* (1991) 501 U.S. 452, 460 [115 L.Ed.2d 410, 423, 111 S.Ct. 2395], with more specific language requiring that Congress make it "unmistakably clear" that it intends to preempt the historic powers of the states, language that appears to contradict *Gulf Offshore Co.* v. *Mobil Oil Corp., supra,* 453 U.S. 473, which permits an implied restriction of jurisdiction. *Gregory,* however, is not a concurrent jurisdiction case at all. In *Gregory,* Missouri state court judges attempted to challenge the state's mandatory retirement in federal court as a violation of the federal Age Discrimination in Employment Act. The Supreme Court affirmed the lower court's dismissal of the action, holding that congressional interference with a decision of the citizens of Missouri regarding the qualifications of their judges "would upset the usual constitutional balance of federal and state powers," which can be done but which requires a clear and manifest statement of intention to preempt the historic powers of the states. (501 U.S. at p. 460 [115 L.Ed.2d at p. 423].) The issues in *Gregory* were clearly different from those before the court in *Gulf Offshore Co.,* and *Gregory* has no application to the matter before us. Under *Gulf Offshore* and other concurrent jurisdiction cases, implied restriction of concurrent jurisdiction is permissible.

Kingston turns to the definition section of the Compact for support. Title III, article I, entitled "Definitions" states in subdivision (e) that the word "state" includes the District of Columbia. (Pub. L. No. 89-774 (Nov. 6, 1966) 80 Stat. 1325.) Kingston contends that in numerous sections of the Compact, when the Congress sought to refer only to Maryland and Virginia, Congress referred to them as "signatories" or "signatory states." Kingston concludes that when Congress used the term "state" in the section at issue here, Congress must have intended to refer to all states, including the District of Columbia.

This analysis omits subdivision (d) of the definitions section of the Compact, which states that the term "signatory" means Maryland, Virginia and the District of Columbia. Thus, the references in the Compact to "signatories" and "signatory states" which Kingston has cited to us cannot simply refer only to Maryland and Virginia.

Moreover, the fact that Congress conferred concurrent jurisdiction on the courts of Maryland and Virginia but not on the District of Columbia courts can be explained. The Compact became law in 1966. The District of Columbia's "state" superior courts were created by Congress in 1970. Pub.L. No. 91-358 (July 29, 1970) 84 Stat. 475, § 11-101, subd. (2)(B).) Prior to 1970, civil actions involving damages exceeding $10,000 were

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heard in the United States District Court for the District of Columbia. (Pub. L. No. 88-241 (Dec. 23, 1963) § 11-962, 77 Stat. 490, § 11-962.)

Under our interpretation of the Compact, if a plaintiff were to file an action against the WMATA in courts of either Maryland, Virginia or the District of Columbia, which is considered a state for purposes of the Compact, the WMATA may seek removal to federal court. Our reading of the Compact is consistent with the interpretation by the federal district court in *District of Columbia ex rel. Geo-Systems, Inc. v. Mergentime Corp.* (U.S. Dist. Ct. (D.D.C.), 1992, No. 92-1474-LFO), an unpublished decision of the district court of the District of

Columbia.

Kingston relies on *Mergentime*, in which the WMATA was cross-defendant and had successfully removed the cross-complaint to the federal court from the "state" court of the District of Columbia. The issue before the court was whether the removal of the entire action, as requested by the defendant in the main action, was permissible. In its discussion, the federal trial court noted that *"Congress's* intent in enacting the WMATA removal provision . . . calls for the exercise of federal jurisdiction here, particularly in light of the fact that the provision establishes concurrent jurisdiction in the Virginia and Maryland courts, but not the District of Columbia courts." (*District of Columbia ex rel. Geo-Systems, Inc. v. Mergentine Corp., supra,* No. 92-1474-LFO.)

Kingston argues that, in this case, the WMATA's "exclusive remedy" was to remove this action to federal court. The argument implies that because the WMATA did not remove the action to federal court, the WMATA is obligated to defend itself in a California court. But that cannot be. *Medlin v. Boeing Vertol Co.* (3d Cir. 1980) 620 F.2d 957, 960 held that the plaintiff's failure to challenge removal cannot confer on a federal court subject matter jurisdiction that it does not otherwise possess. Likewise, the defendant's failure to seek removal cannot confer subject matter jurisdiction on a state court. (See *National Union Fire Ins.* Co. *v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1723-1724 [1 Cal.Rtr.2d 570] [subject matter jurisdiction cannot be conferred by consent, waiver or estoppel].)

As stated in *National Union Fire Ins. Co. v. Stites Prof. Law Corp., supra,* 235 Cal.App.3d at pages 1723-1724, a challenge to subject matter jurisdiction cannot be waived, nor can it be barred by application of the doctrine of estoppel. Indeed, lack of subject matter jurisdiction can be raised for the ftrst time on appeal. *(Id.,* at p. 1724.) Therefore, to the extent that Kingston's waiver and estoppel arguments address subject matter jurisdiction, we need not consider them. Having concluded that we are without subject matter jurisdiction, we need not determine Kingston's personal jurisdiction contentions.

The order is affirmed.

DISPOSITION

Boren, P. J., and Zebrowski, J., concurred.

Opinion, Supreme Court of California, Case No. S053577, entered on January 9, 1997

[No. S053577. Jan. 9, 1997.]

KINGSTON CONSTRUCTORS, INC., Plaintiff and Appellant, v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Defendant and Respondent.

COUNSEL

Ronald K. Losch and Lesley Annis for Plaintiff and Appellant.

Mayer, Brown & Platt, Kenneth S. Geller and Donald M. Falk for Defendant and Respondent.

OPINION

MOSK, J.--We granted review in this cause to address a question of first impression concerning the Washington Metropolitan Area Transit Authority Compact (hereafter the WMATA Compact or the compact) and its creature, the Washington Metropolitan Area Transit Authority (hereafter WMATA or the authority), which is a regional instrumentality empowered, among other things, to provide transit facilities in and around the District of Columbia and neighboring parts of the State of Maryland and the Commonwealth of Virginia, comprising the Washington Metropolitan Area Transit Authority Zone (hereafter the WMATA Zone).

The question is: Do the courts of the State of California have jurisdiction of actions brought by or against WMATA?

For the reasons that follow, we conclude that the answer is: No.

On May 28, 1992, Power Energy Industries (hereafter PEI), a California corporation, brought an action in the Los Angeles Superior Court, bearing No. BC056254, against Kingston Constructors, Inc.

(hereafter Kingston), another California corporation, and WMATA. PEI asserted various claims in contract and in tort, and sought damages and costs including attorney fees, based on allegations to the following effect: WMATA entered into a contract with Kingston to supply and install certain electrical transformers, with PEI as an intended third party beneficiary to design and manufacture the items; Kingston in turn entered into a subcontract with PEI to design and manufacture the electrical transformers; WMATA and Kingston proceeded to breach duties they owed PEI pursuant to the contract and the subcontract, and caused it injury; they also violated obligations they bore it under the law of torts, and caused it injury in this way as well.

By letter dated July 24, 1992, WMATA informed the clerk of the superior court that it would not enter an appearance in No. BC056254 because, among other reasons, under section 81 of the WMATA Compact the superior court did not have jurisdiction of the action as to the Authority. Within days, WMATA communicated its position to PEI, and PEI in turn communicated it to Kingston.

It appears that, on or about September 9, 1992, on PEI's motion, the superior court dismissed Kingston as a party from No. BC056254 without prejudice.

On October 19, 1992, on PEI's application, the clerk of the superior court entered WMATA's default in No. BC056254.

It appears that, on or about November 10, 1992, PEI brought an action in the superior court, bearing No. BC068273, against Kingston alone--an action that was substantially similar to No. BC056254.

On December 22, 1993, as part of the settlement of No. BC068273, PEI assigned to Kingston its claims against WMATA in No. BC056254.

On May 5, 1994, the superior court rendered judgment on default in

No. BC056254,[1] in favor of Kingston as assignee of PEI's claims and against WMATA, awarding damages in the sum of $6,934,758, plus pre- and post-judgment interest, and attorney fees in the sum of $50,655.

On September 1, 1994, on WMATA's motion, the superior court issued an order vacating as void the judgment in No. BC056254.[2] It concluded that, under section 81 of the WMATA Compact, it did not have jurisdiction of the action.

On November 9, 1994, Kingston filed a notice of appeal from the superior court's order in No. BC056254.[3]

On April 3, 1996, in an opinion subsequently certified for publication, Division Two of the Second Appellate District of the Court of Appeal affirmed the superior court's order in No. BC056254[4] It held that, under section 81 of the WMATA Compact, the lower court did not have jurisdiction of the action.

On July 10, 1996, on Kingston's petition, we granted review. We now affirm.

(1a) The issue before us is whether California courts have jurisdiction of actions brought by or against WMATA. Its resolution requires us to set out the background.

WMATA is a regional instrumentality empowered, among other

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1 Apparently because of a clerical error, the judgment incorrectly bears No. BC068273.

2 Apparently because of the clerical error on the judgment (see fn. 1, *ante*), the order incorrectly bears No. BC068273.

3 Apparently because of the clerical error on the order (see fn. 2, *ante*), *the* notice of appeal incorrectly bears No. BC068273.

4 Apparently because of the clerical error on the notice of appeal (see fn. 3, *ante*), *the* Court of Appeal's opinion incorrectly bears No. BC068273.

things, to provide transit facilities in and around the District of Columbia and neighboring parts of Maryland and Virginia, which comprise the WMATA Zone. (Pub.L. No. 89-774 (Nov. 6, 1966) 80 Star. 1324.) Its ultimate source of funding is Congress, the district, and these two states. (Id. § I, 80 Star. 1331.)

The WMATA Compact established WMATA and created the WMATA Zone. The compact was initiated and consummated by Congress for federal purposes, including the "effective performance of the functions of the United States Government located within the [National Capital] Region" and the "preservation of the beauty and dignity of the Nation's Capital." (Pub. L. No. 89-774 (Nov. 6, 1966) preamble, 80 Stat. 1324; see generally, Sen.Rep. No. 1491, 89th Cong. 2d Sess. pp. 3-5, 27.) The compact was also intended to further joint federal, state, and local objectives in the "Region," such as the "satisfactory movement of people and goods," the "alleviation of present and future traffic congestion," "economic welfare and vitality," "orderly growth and development," and the "comfort and convenience of... residents and visitors." (Pub. L. No. 89-774 (Nov. 6, 1966) preamble, 80 Stat. 1324.)

The WMATA Compact was entered into by the three signatories within the WMATA Zone. The compact was joined by the District of Columbia, through enactment by Congress (Pub.L. No. 89-774 (Nov. 6, 1966) 80 Stat. 1324-1325) pursuant to the United States Constitution and its powers thereunder, specifically: (a) article I, section 8, clause 17, which grants it power "[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District" as "the Seat of the Government of the United States"; (b) article I, section 8, clause 3, which grants it power "[t]o regulate Commerce . . . among the several States"; and (c) article I, section 8, clause 18, which grants it power "[t]o make all Laws which shall be necessary and proper for carrying [its other powers] into Execution." The compact was also joined by Maryland, which is one of the two states that border the district and come within the zone, through enactment by its General Assembly. (1965 Md. Laws, ch. 869.) The compact was joined as well by Virginia, which is the other of the two states that border the district and come within the zone, through enactment by

its General Assembly. (1966 Va. Acts, ch. 2.)

The WMATA Compact was consented to by Congress (Pub.L. No. 89-774 (Nov. 6, 1966) preamble, 80 Stat. 1324-1325) under article I, section 10, clause 3 of the United States Constitution, which provides that "[n]o State shall, without the Consent of Congress . . .enter into any . . . Compact with another State . . . ."

(2) So consented to, it became a law of the United States. (See, e.g., *Texas v. New Mexico* (1987) 482 U.S. 124, 128 [96 L.Ed.2d 105, 113-114, 107 S.Ct. 2279].) As such, it is "supreme," pursuant to article VI, clause 2 of the United States Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It thereby renders without effect any such state provision that is in conflict. (See, e.g., *State of Pennsylvania v. The Wheeling &c. Bridge Co. et al.* (1852) 54 U.S. (13 How.) 518, 566 [14 L.Ed. 249, 269]; see generally, *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 [120 L.Ed.2d 407, 422-423, 112 S.Ct. 2608].)

(lb) Section 81 of the WMATA Compact, with which we are here concerned, bears the title, "Jurisdiction of Courts," and declares in its entirety: "'The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against WMATA] and to enforce subpoenas issued under [the WMATA Compact]. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).'" (Pub.L. No. 89-774 (Nov. 6, 1966) § 1, 80 Star. 1350; accord., § 4, 80 Stat. 1353.)

When we seek the meaning of section 81 of the WMATA Compact, as we must, in its words within their context (see, e.g., *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 672-673 [47 Cal.Rptr.2d 108, 905 P.2d 1248] (conc. opn. of Mosk, J.)), what we find is as follows.

First, by its title and according to its terms, section 81 of the WMATA Compact deals with the "jurisdiction" of courts over actions

brought by or against WMATA, namely, the power to consider and decide such causes.[5]

Second, section 81 of the WMATA Compact specifies the "original" jurisdiction of WMATA actions, that is, the power to entertain causes of this sort in the first instance *(Brown* v. *Pitchess* (1975) 13 Cal.3d 518, 521 [119 Cal.Rptr. 204, 531 P.2d 772]). It appears to assume that the "appellate" jurisdiction of such actions, that is, the power to review their outcome, follows as otherwise provided.

Third, section 81 of the WMATA Compact expressly grants jurisdiction of WMATA actions to the courts of the United States--more precisely, it grants original jurisdiction specifically to the United States District Courts. Because WMATA was established by the WMATA Compact, actions involving the authority arise under the compact, at least ultimately. (Cf. *Osborn* v. *United States Bank* (1824) 22 U.S. (9 Wheat.) 738, 823 [6 L.Ed. at p. 204, 224] [to similar effect as to the second Bank of the United States, which was a federally chartered corporation]; *American Nat. Red Cross* v. *S.G.* (1992) 505 U.S. 247, 264-265 [120 L.Ed.2d 201,217-218, 112 S.Ct. 2465] [to similar effect as to the American National Red Cross, another federally chartered corporation].) And because the compact is a federal law, such actions are within the power of the federal courts pursuant to article III, section 2, clause 1 of the United States Constitution. (Cf. *Osborn* v. *United States Bank, supra,* 22 U.S. (9 Wheat.) at p. 823 [6 L.Ed. at p. 224] [to similar effect as the federal charter of the second Bank of the United States]; *American Nat. Red Cross* v. *S.G., supra,* 505 U.S. at pp. 264-265 [120 L.Ed.2d at pp. 217-218] [to similar effect as to the federal charter of the American National Red Cross].)[6]

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5 What section 81 of the WMATA Compact speaks of as jurisdiction of an action corresponds to what California law refers to as "[j]urisdiction of the subject matter" (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 10, p. 555; see, e.g., *Greener* v. *Workers' Comp. Appeals Bd.*. (1993) 6 Cal.4th 1028, 1035 [25 Cal.Rptr.2d 539, 863 P.2d 784]; *Abelleira* v. *District Court of Appeal* (1941) 17 Cal.2d 280, 288 [109 P.2d 942, 132 A.L.R. 715]).

6 In *Qasim v. Washington Metro. Area Transit Auth.* (D.C.App. 1983) 455 A.2d 904, 906 (in bank) (hereafter sometimes *Qasim),* the District of Columbia Court of Appeals implied that WMATA actions are "local matters." The "locality," of

Fourth, section 81 of the WMATA Compact expressly grants jurisdiction of WMATA actions concurrently to the courts of Maryland and Virginia--more precisely, it grants them original jurisdiction, albeit without further specification.[7] The WMATA Zone embraces territory belonging to these two states. As a result, it encompasses geographical area within which their courts may properly exercise judicial power--subject, of course, to the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution (see, e.g., *Shaffer v. Heitner* (1977) 433 U.S. 186, 189-212 [53 L.Ed.2d 683, 688-703, 97 S.Ct. 2569]).[8]

Fifth, and crucial,. section 81 of the WMATA Compact impliedly denies jurisdiction of WMATA actions to the courts of states other than Maryland and Virginia--more precisely, it impliedly denies them

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course, is the District of Columbia, which is "the Seat of the Government of the United States" (U.S. Const., art. I, § 8, cl. 17), and neighboring parts of Maryland and Virginia--the "National Capital Region." (Pub. L. No. 89-774 (Nov. 6, 1966) preamble, 80 Stat. 1324.) We do not understand the *Qasim* court's implication to amount to a denial that the WMATA Compact is a federal law. Such a denial would be erroneous.

7 If it is parsed strictly, section 81 of the WMATA Compact expressly grants jurisdiction of WMATA actions to the courts of Maryland and Virginia and concurrently to the courts of the United States.

8 That section 81 of the WMATA Compact does not expressly grant jurisdiction of WMATA actions concurrently to the local courts of the District of Columbia is not surprising. At the time the compact was consented to by Congress it was the courts of the United States, and not the district's local courts, that functioned as "state" courts for the district. "[T]he local court system consisted of one appellate court and three trial courts, two of which... were courts of special jurisdiction. The third trial court... was one of quite limited jurisdiction .... The judgments of the appellate court... were subject to review by the United States Court of Appeals for the District of Columbia Circuit." *(Palmore v. United States* (1973) 411 U.S. 389, 392, fn. 2 [36 L.Ed.2d 342, 348-349, 93 S.Ct. 1670]; see generally, Pub.L. No. 88-241 (Dec. 23, 1963) 77 Star. 478.) Subsequently, the district's local courts were reorganized to "succeed" the federal courts in their function as "state" courts for the district. (See *Palmore v. United States, supra,* 411 U.S. at pp. 407-409 [36 L.Ed.2d at pp. 357-358]; see generally, Pub. L. No. 91-358 (July 29, 1970) 84 Star. 473, 475.)

We note in passing that the Qasim court held that section 81 of the WMATA Compact impliedly grants jurisdiction of WMATA actions concurrently to the District of Columbia's local courts as reorganized. *(Qasim v. Washington Metro. Area Transit Auth., supra,* 455 A.2d at pp. 906-907.)

original jurisdiction. It explicitly includes Maryland and Virginia courts. It thereby implicitly excludes the rest. *Expressio duorum, exclusio ceterorum. The* WMATA Zone does not embrace territory belonging to any of the other states. As a result, it does not encompass geographical area within which their courts could properly exercise judicial power.

Not to the contrary is the language of section 81 of the WMATA Compact itself: "'The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against [WMATA] . . . . Any such action initiated in a State Court shall be removable to the appropriate United States District Court . . . . '" (Pub.L. No. 89-774 (Nov. 6, 1966) § 1, 80 Stat. 1350.) Read in context, the later phrase, "State Court," is a mere shorthand for the earlier one, "the Courts of Maryland and Virginia." It cannot reasonably be taken to mean the courts *of the several states generally.*[9] To do so would obliterate the manifest distinction drawn between Maryland and Virginia, on the one side, and the other states, on the opposite. Neither can it reasonably be taken to mean the courts *of states other than Maryland and Virginia.* To do so would entail the conclusion that a WMATA action "initiated" in a court of Maryland or Virginia" shall not be removable to the appropriate United States District Court . . . ." Practical construction undermines such a position: WMATA actions initiated in Maryland or Virginia courts are in fact removed (see *Malone v. Washington Metro. Area Transit Auth.* (E.D.Va. 1985) 622 F. Supp. 1422, 1424).

Sixth, and final, section 81 of the WMATA Compact provides that a WMATA action initiated in a Maryland or Virginia court may be removed to the appropriate federal district court in accordance with section 1446 of title 28 of the United States Code, which specifies the procedures for removal *(City of Cincinnati, Ohio v. Weaver* (S.D.Ohio

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9 Being not at all similar to provisions such as section 1352 of title 28 of the United States Code, which declares that, subject to a limited exception, the United States "district courts shall have original jurisdiction, concurrent with *State courts,* Of any action on a bond executed under any law of the United States .... "(Italics added.)

1965) 245 F. Supp. *529,* 532).

It follows from the forgoing that California courts do not have jurisdiction of WMATA actions. Section 81 of the WMATA Compact impliedly denies jurisdiction of such actions to the courts of states other than Maryland and Virginia. It thereby denies it to those of California.

Against this conclusion, Kingston argues that section 81 of the WMATA Compact does not in fact grant jurisdiction of WMATA actions only to the courts of the United States and to those of Maryland and Virginia. It urged this point vigorously in the superior court and the Court of Appeal, but has all but abandoned it here.

What remains is this: Under decisions such as *Yellow Freight System, Inc. v. Donnelly* (1990) 494 U.S. 820 [108 L.Ed.2d 834, 110 S.Ct. 1566] (hereafter sometimes *Yellow Freight System), Taffiin v. Levitt* (1990) 493 U.S. 455 [107 L.Ed.2d 887, 110 S.Ct. 792] (hereafter sometimes *Taffiin), Gulf Offshore Co. v. Mobil Oil Corp.* (1981) 453 U.S. 473 [69 L.Ed.2d 784, 101 S.Ct. 2870] (hereafter sometimes *Gulf Offshore Co.*), and *Dowd Box Co. v. Courtney* (1962) 368 U.S. 502 [7 L.Ed.2d 483, 82 S.Ct. 519] (hereafter sometimes *Dowd Box Co.),* there is a "presumption that state courts enjoy concurrent jurisdiction" with federal courts *(Gulf Offshore Co. v. Mobil Oil Corp., supra,* 453 U.S. at p. 478 [69 L.Ed.2d at pp. 791-792]; accord, *Yellow Freight System, Inc. v. Donnelly, supra,* 494 U.S. at p. 823 [108 L.Ed.2a at pp. 839-840]; *Taffin v. Levitt, supra,* 493 U.S. at p. 458 [107 L.Ed.2d at pp. 893-894]; see *Gulf Offshore Co. v. Mobil Oil Corp., supra,* 453 U.S. at pp. 477-478 [69 L.Ed.2d at pp. 790-792]; *Dowd Box Co. v. Courtney, supra,* 368 U.S. at pp. 507-508 [7 L.Ed.2d at pp. 486-488]).

Under *Yellow Freight System, Taffiin, Gulf Offshore Co., and Dowd Box Co.*, there is indeed a "presumption of concurrent jurisdiction" between federal courts and state courts. *(Gulf Offshore Co. v. Mobil Oil Corp., supra,* 453 U.S. at p. 478 [69 L.Ed.2d at p. 791].) But that presumption arises *when the jurisdictional provision in question is silent as to the jurisdiction of state courts.* That is not the case here.

In *Yellow Freight System, the* jurisdictional provision is section 706(f) of title VII of the Civil Rights Act of 1964: "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought" thereunder. (Pub.L. No. 88-352 (July 2, 1964) tit. VII, § 706(f), 78 Stat. 260-261; see *Yellow Freight System, Inc. v. Donnelly, supra,* 494 U.S. at p. 823 [108 L.Ed.2d at pp. 839-840].) There is not a word about state courts or their jurisdiction.

In *Taffiin,* the jurisdictional provision is section 1964(c) of title 18 of the United States Code, which is part of the Racketeer Influenced and Corrupt Organizations Act (RICO), as originally enacted: "'Any person injured in his business or property by reason of a violation of [the act] may sue therefor in any appropriate United States district court .... '" (Pub.L. No. 91-452 (Oct. 14, 1970) tit. IX, 84 Stat. 944; see *Taffin v. Levitt, supra,* 493 U.S. at p. 460 [107 L.Ed.2d at pp. 894-895].) Again, not a word about state courts or their jurisdiction.

In *Gulf Offshore Co.,* the jurisdictional provision is section 4(b) of the Outer Continental Shelf Lands Act of 1953: "The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for [specified] purpose[s]" (Pub.L. No. 212, 83d Cong., 1st Sess. (Aug. 7, 1953) § 4(b), 67 Stat. 463; see *Gulf Offshore Co. v. Mobil Oil Corp., supra,* 453 U.S. at pp. 478-479 [69 L.Ed.2d at pp. 791-792].) Again, not a word about state courts or their jurisdiction.

In *Dowd Box Co.,* the jurisdictional provision is section 301(a) of the Labor Management Relations Act of 1947: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties "(Pub.L. No. 101, 80th Cong. 1st Sess. (June 23, 1947) title III, § 301(a), 61 Stat. 156; see *Dowd Box Co. v. Courtney, supra,* 368 U.S. 502.) Again, not a word about state courts or their jurisdiction.

Here, the jurisdictional provision is section 81 of the WMATA Compact, which, it will be recalled, states in pertinent part that "'[t]he United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against'" WMATA (Pub.L. No. 89-774 (Nov. 6, 1966) § 1, 80 Stat. 1350; accord, *id.*, § 4, 80 Stat. 1353). Its words are largely directed at state courts and their jurisdiction--to the express effect that the courts of Maryland and Virginia have jurisdiction of WMATA actions concurrently with courts of the United States, and to the implied effect that the courts of other *states* do not.[10]

Kingston then argues that, if section 81 of the WMATA Compact purports to grant jurisdiction of WMATA actions only to the courts of the United States and to those of Maryland and Virginia, it is violative of the United States Constitution and thereby void. It hardly raised this point in the superior court or the Court of Appeal, but urges it vigorously here.

We begin with the "heavy presumption" that section 81 of the WMATA Compact, like all other provisions of all other federal laws, does not violate the United States Constitution. *(Department of Labor v. Triplett* (1990) 494 U.S. 715, 721 [108 L.Ed.2d 701,713-714, 110 S.Ct. 1428].) As will appear, we shall end with the conclusion that this presumption has not been rebutted.

Congress's power under article I, section 8, clause 17 of the United

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10 Kingston quotes our statement in *Brown v. Pitchess, supra,* 13 Cal. 2d at page 521: "The phrase 'original jurisdiction'... does not mean exclusive jurisdiction." That is true. But it is of no benefit to its position. Our analysis does not assume the opposite.

In holding that section 81 of the WMATA Compact impliedly grants jurisdiction of WMATA actions concurrently to the District of Columbia's local courts as reorganized (see fn. 8, *ante*), *the Qasim* court relied on the "Presumption of concurrent jurisdiction" *(Gulf Offshore Co. v. Mobil Oil Corp., supra,* 453 U.S. at p. 478 [69 L. Ed.2d at pp. 791-792]) between federal courts and state courts. *(Qasim v. Washington Metro. Area Transit Auth., supra, 455* A.2d at p. 907.) We must reject the soundness of its reliance. But we need not pass on the correctness of its holding. One may justify its conclusion on the ground, not available to the courts of any of the states, that the district's local courts as reorganized "succeeded" the federal courts in their function as "state" courts for the district.

States Constitution "[rio exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia as "the Seat of the Government of the United States," is broad indeed. It has been called "plenary." (*Pamore v. United States, supra,* 411 U.S. at p. 397 [36 L.Ed.2d at pp. 351-352].) And it has been held to extend even "outside of" the district's "territorial limits." *(National Ins. Co. v. Tidewater Co.* (1949) 337 U.S. 582, 600 [93 L.Ed. 1556, 1572, 69 S.Ct. 1173].) The reason is plain. It belongs to Congress "not [as] a local legislature, but . . . in its high character, as the legislature of the union." (*Cohens v. Virginia* (1821) 19 U.S. (6 Wheat.) 264, 429 [5 L.Ed. 257, 297].)

Similarly broad is Congress's power under article I, section 8, clause 3 of the United States Constitution "[t]o regulate Commerce . . . among the several States .... "It too has been called "plenary." *(Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264, 276 [69 L.Ed.2d 1, 15-16, 101 S.Ct. 2352].) It is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, o[t]her than are prescribed in the constitution." *(Gibbons v. Ogden* (1824) 22 U.S. (9 Wheat.) 1,196 [6 L.Ed. 23, 70].)

Whatever breadth may be lacking in its seat-of-government and commerce powers is supplied to Congress through its power under article I, section 8, clause 18 of the United States Constitution "[t]o make all Laws which shall be necessary and proper for carrying [its other powers] into Execution .... "This teaching is old. (See *McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316, 400-425 [4 L.Ed. 579, 600-606].) It remains vital today.

After consideration, we believe that section 81 of the WMATA Compact falls comfortably within Congress's seat-of-government and commerce powers, whether each is considered separately or both together, either with the necessary-and-proper power or without.

Section 81 of the WMATA Compact grants jurisdiction of WMATA actions to the courts of the United States. It is not problematic in this regard. As explained, because WMATA was established by the WMATA Compact, actions involving the

authority arise under the compact, at least ultimately; and because the compact is a federal law, such actions are within the power of the federal courts. The WMATA Zone includes the District of Columbia as the seat of government. By embracing as well territory belonging to Maryland and Virginia, it comprehends the commerce flowing between and among the district and these two states.

Section 81 of the WMATA Compact also grants jurisdiction of WMATA actions concurrently to the courts of Maryland and Virginia. Neither is it problematic in this regard. It could surely have denied jurisdiction of such actions to the courts of the several states generally. (See, e.g., The *Moses Taylor* (1867) 71 U.S. (4 Wall.) 411, 428-430 [18 L.Ed. 397,401-402].) That it excepted the courts of these two states causes no offense: The WMATA Zone embraces territory belonging to them alone.

Kingston's attack on section 81 of the WMATA Compact under the United States Constitution is essentially three pronged. The first part effectively challenges the compact in general as an unconstitutional agreement among states, including the District of Columbia as a "state" along with Maryland and Virginia. It fails. As explained, the compact was initiated and consummated by Congress for federal purposes. As also explained, on its face and in its substance, it is a federal law. Whether it is *permitted* is material--it is--not whether it is *required.* (See *Cuyler v. Adams* (1981) 449 U.S. 433, 440 [66 L.Ed.2d 641,648-649, 101 S.Ct. 703].) The second part of the attack also effectively challenges the compact in general, this time as a federal law that is beyond Congress's powers. It too fails. As explained, the compact falls comfortably within such powers. The third part of the attack effectively challenges section 81 itself as invidiously discriminatory in favor of Maryland and Virginia and against the other states, apparently in violation the Fifth Amendment's due process clause. It fails as well. Any discrimination effected by section 81 seems hardly invidious: the WMATA Zone embraces territory belonging to Maryland and Virginia, and does not embrace territory belonging to any other state. In consenting to the compact, Congress effectively declared its view that section 81 was not invidiously discriminatory. Included therein were senators and

representatives from Maryland and Virginia. Included also, and in overwhelming numbers, were their counterparts from the other states. If these did not discern invidious discrimination in section 81--and they apparently did not: they expressed no recorded opposition--We have no basis to do otherwise.[11]

III

Having determined that California courts do not have jurisdiction of actions brought by or against WMATA, we must, and do, conclude that the Court of Appeal was right to hold that the superior court did not have jurisdiction of No. BC056254 when it vacated the judgment therein as void.

In arguing to the contrary, Kingston asserts that section 81 of the WMATA Compact does not in fact grant jurisdiction of WMATA actions only to the courts of the United States and to those of Maryland and Virginia. We addressed the point above, and found it wanting.

Kingston then asserts that, if section 81 of the WMATA Compact purports to grant jurisdiction of WMATA actions only to the courts of the United States and to those of Maryland and Virginia, it is violative of the United States Constitution and thereby void. We addressed this point too, and found it wanting as well.

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11 To the extent that Kingston's claim that section 81 of the WMATA Compact is invidi-ously discriminatory is based on its asserted uniqueness in granting jurisdiction of actions to the courts of some states but not all, it collapses under its own weight. A similar provision is near at hand. Article VI(b) of the Tahoe Regional Planning Compact declares in pertinent part: "The appropriate courts of" California and Nevada, "each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over... actions to which" the Tahoe Regional Planning Agency "'is a party .... Each such action shall be brought in a court of the state... where the property affected by [the] action is situated, unless the action is brought in a federal court.'" (Pub. L. No. 91-148 (Dec. 18, 1969) 83 Stat. 360, 367.)
To the extent that Kingston's claim against section 81 of the WMATA Compact extends toviolation of such provisions of the United States Constitution as article III and the TenthAmendment, it must be rejected out of hand as insubstantial.

Kingston finally asserts that, even if section 81 of the WMATA Compact does in fact grant jurisdiction of WMATA actions only to the courts of the United States and to those of Maryland and Virginia, as a matter of California law WMATA waived any challenge it might have had to the superior court' s jurisdiction. Whether such an outcome would be countenanced by the supremacy clause is a question we need not reach. The fact is, it is not the outcome here. (3) Under California law, a party simply cannot waive such a challenge. *(DeTomaso v. Pan American World Airways, Inc. (1-987)* 43 Cal.3d 517, 520, fn. I [235 Cal.Rptr. 292, 733 P.2d 614].[12]

IV

For the reasons stated above, we conclude that we must affirm the judgment of the Court of Appeal.

It is so ordered.

George, C.J., Kennard, J., Baxter, J., Werdegar, J., Chin, J., and

Brown, J., concurred.

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12 Kingston complains that WMATA should have removed no. BC056254 from the superior court to the appropriate United States District Court. Any such removal would have been to no avail. Kingston assumes that the federal district court would have acquired jurisdiction of the action from the superior court. Not so. "[I]t is well settled that" when, as her, "the state court lacks jurisdiction. . . , the federal court acquires none upon removal, even though the federal court would have had jurisdiction if the suit had originated there." (*Arizona v. Manypenny* (1981) 451 U.S. 232, fn. 17 [68 L.Ed.2d 58, 69, 101 S.Ct. 1657].)

"Organization and Procedure

"7. The Board shall provide for its own organization and procedure. It shall organize annually by the election of a Chairman and Vice-Chairman from among its members. Meetings of the Board shall be held as frequently as the Board deems that the proper performance of its duties requires and the Board shall keep minutes of its meetings. The Board shall adopt rules and regulations governing its meeting, minutes and transactions.

"Quorum and Actions by the Board

"8. (a) Four Directors or alternates consisting of at least one Director or alternate appointed from each Signatory, shall constitute a quorum and no action by the Board shall be effective unless a majority of the Board, which majority shall include at least one Director or alternate from each Signatory, concur therein; provided, however, that a plan of financing may be adopted or a mass transit plan adopted, altered, revised or amended by the unanimous vote of the Directors representing any two Signatories.

"(b) The actions of the Board shall be expressed by motion or resolution. Actions dealing solely with internal management of the Authority shall become effective when directed by the Board, but no other action shall become effective prior to the expiration of thirty days following its adoption; provided, however, that the Board may provide for the acceleration of any action upon a finding that such acceleration is required for the proper and timely performance of its functions.

"Officers

"9. (a) The officers of the Authority, none of whom shall be members of the Board, shall consist of a general manager, a secretary, a treasurer, a comptroller and a general counsel and such other officers as the Board may provide. Except for the office of general manager and comptroller, the Board may consolidate any of such other offices in one person. All such officers shall be appointed and may be removed by the Board, shall serve at the pleasure of the Board and shall perform such duties and functions as the Board shall specify. The Board shall fix and determine the compensation to be paid to all officers and, except for the general manager who shall be a full-time employee, all other officers may be hired on a full-time or part-time basis and may be compensated on a salary or fee basis, as the Board may determine. All employees and such officers as the Board may designate shall be appointed and removed by the general manager under such rules of procedure and standards as the Board may determine.

"(b) The general manager shall be the chief administrative officer of the Authority and, subject to policy direction by the Board, shall be responsible for all activities of the Authority.

"(c) The treasurer shall be the custodian of the funds of the Authority, shall keep an account of all receipts and disbursements and shall make payments only upon warrants duly and regularly issued

"(d) An oath of office in the form set out in Section 5(b) of this Article shall be taken, subscribed and filed with the Board by all appointed officers.

"(e) Each Director, officer and employees specified by the Board shall give such bond in such form and amount as the Board may require, the premium for which shall be paid by the Authority.

"Conflict of Interests

"10. (a) No Director, officer or employee shall:

"(1) be financially interested, either directly or indirectly, in any contract, sale, purchase, lease or transfer of real or personal property to which the Board or the Authority is a party;

"(2) in connection with services performed within the scope of his official duties, solicit or accept money or any other thing of value in addition to the compensation or expenses paid to him by the Authority;

"(3) offer money or any thing of value for or in consideration of obtaining an appointment, promotion or privilege in his employment with the Authority.

"(b) Any Director, officer or employee who shall willfully violate any provision of this section shall, in the discretion of the Board, forfeit his office or employment.

"(c) Any contract or agreement made in contravention of this section may be declared void by the Board.

"(d) Nothing in this section shall be construed to abrogate or limit the applicability of any federal or state law which may be violated by any action prescribed by this section.

"ARTICLE IV

"PLEDGE OF COOPERATION

"11. Each Signatory pledges to each other faithful cooperation in the achievement of the purposes and objects of this Title.

"ARTICLE V

"GENERAL POWERS

"Enumeration

"12. In addition to the powers and duties elsewhere described in this Title, and except as limited in this Title, the Authority may:

"(a) Sue and be sued;

"(b) Adopt and use a corporate seal and alter the same at pleasure;

"(c) Adopt, amend, and repeal rules and regulations respecting the exercise of the powers conferred by this Title;

"(d) Construct, acquire, own, operate, maintain, control, sell and convey real and personal property and any interest therein by contract, purchase, condemnation, lease, license, mortgage or otherwise but all of said property shall be located in the Zone and shall be necessary or useful in rendering transit service or in activities incidental thereto;

"(e) Receive and accept such payments, appropriations, grants, gifts, loans, advances and other funds, properties and services as may be transferred or made available to it by any signatory party, any political subdivision or agency thereof, by the United States, or by any agency thereof, or by any other public or private corporation or individual, and enter into agreements to make reimbursement for all or any part thereof;

Washington Metropolitan Area Transit Authority Compact,
(Pub.L. No. 89-774 (Vol. 6, 1966)
Stat. 1324-1325.)

Public Law 89-774

AN ACT

To grant the consent of Congress for the States of Virginia and Maryland and the District of Columbia to amend the Washington Metropolitan Area Transit Regulation Compact to establish an organization empowered to provide transit facilities in the National Capital Region and for other purposes and to enact said amendment for the District of Columbia.

Whereas Congress heretofore has declared in the National Capital Transportation Act of 1960 (Public Law 86–669, 74 Stat. 537) and in the National Capital Transportation Act of 1965 (Public Law 89–173, 79 Stat. 663) that a coordinated system of rail rapid transit, bus transportation service, and highways is essential in the National Capital Region for the satisfactory movement of people and goods, the alleviation of present and future traffic congestion, the economic welfare and vitality of all parts of the Region, the effective performance of the functions of the United States Government located within the Region, the orderly growth and development of the Region, the comfort and convenience of the residents and visitors to the Region, and the preservation of the beauty and dignity of the Nation's Capital and that such a system should be developed cooperatively by the Federal, State, and local governments of the National Capital Region, with the costs of the necessary facilities financed, as far as possible, by persons using or benefiting from such facilities and the remaining costs shared equitably among the Federal, State, and local governments;

Whereas in furtherance of this policy, Congress, in title III of the National Capital Transportation Act of 1960, authorized the District of Columbia, the Commonwealth of Virginia, and the State of Maryland to negotiate a Compact for the establishment of an organization, empowered, inter alia, to provide regional transportation facilities;

Whereas, it is the sense of the Congress that the Mass Transit Plan authorized by the Compact and this Act shall conform to the fullest extent practicable with the Comprehensive Plan for the National Capital and the general plan for the development of the National Capital Region prepared pursuant to the National Capital Planning Act of 1952 (Public Law 82–592, 66 Stat. 781); and

Whereas, the District of Columbia, the Commonwealth of Virginia and the State of Maryland, with a representative of the United States appointed by the President, have negotiated such a Compact, known as the Washington Metropolitan Area Transit Authority Compact, which amends the Washington Metropolitan Area Transit Regulation Compact, heretofore consented to by the Congress (Public Law 86–794, 74 Stat. 1031, as amended by Public Law 87–767, 76 Stat. 764), by adding thereto a title III and said Compact has been enacted by Maryland (Ch. 869, Acts of General Assembly 1965) and in substantially the same language by Virginia (Ch. 2, 1966 Acts of Assembly): Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby consents to, adopts and enacts for the District of Columbia an amendment to the Washington Metropolitan Area Transit Regulation Compact, for which Congress heretofore has granted its consent (Public Law 86–794, 74 Stat. 1031, as amended by Public Law 87–767, 76 Stat. 764) by adding thereto title III, known as the Washington

"ARTICLE III

"ORGANIZATION AND AREA

"Washington Metropolitan Area Transit Zone

"3. There is hereby created the Washington Metropolitan Area Transit Zone which shall embrace the District of Columbia, the cities of Alexandria, Falls Church and Fairfax and the counties of Arlington and Fairfax and political subdivisions of the Commonwealth of Virginia located within those counties, and the counties of Montgomery and Prince George's in the State of Maryland and political subdivisions of the State of Maryland located in said counties.

"Washington Metropolitan Area Transit Authority

"4. There is hereby created, as an instrumentality and agency of each of the signatory parties hereto, the Washington Metropolitan Area Transit Authority which shall be a body corporate and politic, and which shall have the powers and duties granted herein and such additional powers as may hereafter be conferred upon it pursuant to law.

"Board Membership

"5. (a) The Authority shall be governed by a Board of six Directors consisting of two Directors for each signatory. For Virginia, the Directors shall be appointed by the Northern Virginia Transportation Commission; for the District of Columbia, by the Commissioners of the District of Columbia; and for Maryland, by the Washington Suburban Transit Commission. In each instance the Director shall be appointed from among the members of the appointing body and shall serve for a term coincident with his term on the body by which he was appointed. A Director may be removed or suspended from office only as provided by the law of the signatory from which he was appointed. The appointing authorities shall also appoint an alternate for each Director, who may act only in the absence of the Director for whom he has been appointed an alternate, and each alternate shall serve at the pleasure of the appointing authority. In the event of a vacancy in the Office of Director or alternate, it shall be filled in the same manner as an original appointment.

"(b) Before entering upon the duties of his office each Director and alternate director shall take and subscribe to the following oath (or affirmation) of office or any such other oath or affirmation, if any, as the Constitution or laws of the signatory he represents shall provide:

"'I, ----------, hereby solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution and Laws of the state or political jurisdiction from which I was appointed as a director (alternate director) of the Board of Washington Metropolitan Area Transit Authority and will faithfully discharge the duties of the office upon which I am about to enter.'

"Compensation of Directors and Alternates

"6. Members of the Board and alternates shall serve without compensation but may be reimbursed for necessary expenses incurred as an incident to the performance of their duties.

Metropolitan Area Transit Authority Compact (herein referred to as title III), substantially as follows:

"TITLE III

"ARTICLE I

"DEFINITIONS

"1. As used in this Title, the following words and terms shall have the following meanings, unless the context clearly requires a different meaning:

"(a) 'Board' means the Board of Directors of the Washington Metropolitan Area Transit Authority;

"(b) 'Director' means a member of the Board of Directors of the Washington Metropolitan Area Transit Authority;

"(c) 'Private transit companies' and 'private carriers' means corporations, persons, firms or associations rendering transit service within the Zone pursuant to a certificate of public convenience and necessity issued by the Washington Metropolitan Area Transit Commission or by a franchise granted by the United States or any signatory party to this Title;

"(d) 'Signatory' means the State of Maryland, the Commonwealth of Virginia and the District of Columbia;

"(e) 'State' includes District of Columbia;

"(f) 'Transit facilities' means all real and personal property located in the Zone, necessary or useful in rendering transit service between points within the Zone, by means of rail, bus, water or air and any other mode of travel, including without limitation, tracks, rights of way, bridges, tunnels, subways, rolling stock for rail, motor vehicle, marine and air transportation, stations, terminals and ports, areas for parking and all equipment, fixtures, buildings and structures and services incidental to or required in connection with the performance of transit service;

"(g) 'Transit services' means the transportation of persons and their packages and baggage by means of transit facilities between points within the Zone and includes the transportation of newspapers, express and mail between such points but does not include taxicab, sightseeing or charter service; and

"(h) 'WMATC' means Washington Metropolitan Area Transit Commission.

"ARTICLE II

"PURPOSE AND FUNCTIONS

"Purpose

"2. The purpose of this Title is to create a regional instrumentality, as a common agency of each signatory party, empowered, in the manner hereinafter set forth, (1) to plan, develop, finance and cause to be operated improved transit facilities, in coordination with transportation and general development planning for the Zone, as part of a balanced regional system of transportation, utilizing to their best advan-

"(f) Enter into and perform contracts, leases and agreements with any person, firm or corporation or with any political subdivision or agency of any signatory party or with the federal government, or any agency thereof, including, but not limited to, contracts or agreements to furnish transit facilities and service;

"(g) Create and abolish offices, employments and positions (other than those specifically provided for herein) as it deems necessary for the purposes of the Authority, and fix and provide for the qualification, appointment, removal, term, tenure, compensation, pension and retirement rights of its officers and employees without regard to the laws of any of the signatories;

"(h) Establish, in its discretion, a personnel system based on merit and fitness and, subject to eligibility, participate in the pension and retirement plans of any signatory, or political subdivision or agency thereof, upon terms and conditions mutually acceptable;

"(i) Contract for or employ any professional services;

"(j) Control and regulate the use of facilities owned or controlled by the Authority, the service to be rendered and the fares and charges to be made therefor;

"(k) Hold public hearings and conduct investigations relating to any matter affecting transportation in the Zone with which the Authority is concerned and, in connection therewith, subpena witnesses, papers, records and documents; or delegate such authority to any officer. Each director may administer oaths or affirmations in any proceeding or investigation;

"(l) Make or participate in studies of all phases and forms of transportation, including transportation vehicle research and development techniques and methods for determining traffic projections, demand motivations, and fiscal research and publicize and make available the results of such studies and other information relating to transportation; and

"(m) Exercise, subject to the limitations and restrictions herein imposed, all powers reasonably necessary or essential to the declared objects and purposes of this Title.

"ARTICLE VI

"PLANNING

"Mass Transit Plan

"13. (a) The Board shall develop and adopt, and may from time to time review and revise, a mass transit plan for the immediate and long-range needs of the Zone. The mass transit plan shall include one or more plans designating (1) the transit facilities to be provided by the Authority, including the locations of terminals, stations, platforms, parking facilities and the character and nature thereof; (2) the design and location of such facilities; (3) whether such facilities are to be constructed or acquired by lease, purchase or condemnation; (4) a timetable for the provision of such facilities; (5) the anticipated capital costs; (6) estimated operating expenses and revenues relating thereto; and (7) the various other factors and considerations, which, in the opinion of the Board, justify and require the projects therein proposed. Such plan shall specify the type of equipment to be utilized, the areas to be served, the routes and schedules of service expected to be provided and the probable fares and charges therefor.

"(b) In preparing the mass transit plan, and in any review of revision thereof, the Board shall make full utilization of all data, studies, reports and information available from the National Capital Trans-

portation Agency and from any other agencies of the federal government, and from signatories and the political subdivisions thereof.

"Planning Process

"14. (a) The mass transit plan, and any revisions, alterations or amendments thereof, shall be coordinated, through the procedures hereinafter set forth, with

"(1) other plans and programs affecting transportation in the Zone in order to achieve a balanced system of transportation, utilizing each mode to its best advantage;

"(2) the general plan or plans for the development of the Zone; and

"(3) the development plans of the various political subdivisions embraced within the Zone.

"(b) It shall be the duty and responsibility of each member of the Board to serve as liaison between the Board and the body which appointed him to the Board. To provide a framework for regional participation in the planning process, the Board shall create technical committees concerned with planning and collection and analyses of data relative to decision-making in the transportation planning process and the Commissioners of the District of Columbia, the component governments of the Northern Virginia Transportation District and the Washington Suburban Transit District shall appoint representatives to such technical committees and otherwise cooperate with the Board in the formulation of a mass transit plan, or in revisions, alterations or amendments thereof.

"(c) The Board, in the preparation, revision, alteration or amendment of a mass transit plan, shall

"(1) consider data with respect to current and prospective conditions in the Zone, including, without limitation, land use, population, economic factors affecting development plans, goals or objectives for the development of the Zone and the separate political subdivisions, transit demands to be generated by such development, travel patterns, existing and proposed transportation and transit facilities, impact of transit plans on the dislocation of families and businesses, preservation of the beauty and dignity of the Nation's Capital, factors affecting environmental amenities and aesthetics and financial resources;

"(2) cooperate with and participate in any continuous, comprehensive transportation planning process cooperatively established by the highway agencies of the signatories and the local political subdivisions in the Zone to meet the planning standards now or hereafter prescribed by the Federal-Aid Highway Acts; and

"(3) to the extent not inconsistent with or duplicative of the planning process specified in subparagraph (2) of this paragraph (c), cooperate with the National Capital Planning Commission, the National Capital Regional Planning Council, the Washington Metropolitan Council of Governments, the Washington Metropolitan Area Transit Commission, the highway agencies of the Signatories, the Maryland-National Capital Park and Planning Commission, the Northern Virginia Regional Planning and Economic Development Commission, the Maryland State Planning Department and the Commission of Fine Arts. Such cooperation shall include the creation, as necessary, of technical committees composed of personnel, appointed by such agencies, concerned with planning and collection and analysis of data relative to decisionmaking in the transportation planning process.

"Adoption of Mass Transit Plan

"15. (a) Before a mass transit plan is adopted, altered, revised or amended, the Board shall transmit such proposed plan, alteration, revision or amendment for comment to the following and to such other agencies as the Board shall determine:

"(1) the Commissioners of the District of Columbia, the Northern Virginia Transportation Commission and the Washington Suburban Transit Commission;

"(2) the governing bodies of the Counties and Cities embraced within the Zone;

"(3) the highway agencies of the Signatories;

"(4) the Washington Metropolitan Area Transit Commission;

"(5) the Washington Metropolitan Council of Governments;

"(6) the National Capital Planning Commission;

"(7) The National Capital Regional Planning Council;

"(8) the Maryland-National Capital Park and Planning Commission;

"(9) the Northern Virginia Regional Planning and Economic Development Commission;

"(10) the Maryland State Planning Department; and

"(11) the private transit companies operating in the Zone and the Labor Unions representing the employees of such companies and employees of contractors providing service under operating contracts.

"Information with respect thereto shall be released to the public. A copy of the proposed mass transit plan, amendment or revision, shall be kept at the office of the Board and shall be available for public inspection. After thirty days' notice published once a week for two successive weeks in one or more newspapers of general circulation within the Zone, a public hearing shall be held with respect to the proposed plan, alteration, revision or amendment. The thirty days' notice shall begin to run on the first day the notice appears in any such newspaper. The Board shall consider the evidence submitted and statements and comments made at such hearing and may make any changes in the proposed plan, amendment or revision which it deems appropriate and such changes may be made without further hearing.

"ARTICLE VII

"FINANCING

"Policy

"16. With due regard for the policy of Congress for financing a mass transit plan for the Zone set forth in Section 204(g) of the National Capital Transportation Act of 1960 (74 Stat. 537), it is hereby declared to be the policy of this Title that, as far as possible, the payment of all costs shall be borne by the persons using or benefiting from the Authority's facilities and services and any remaining costs shall be equitably shared among the federal, District of Columbia and participating local governments in the Zone. The allocation among such governments of such remaining costs shall be determined by agreement among them and shall be provided in the manner hereinafter specified.

"Plan of Financing

"17. (a) The Authority, in conformance with said policy, shall prepare and adopt a plan for financing the construction, acquisition, and

operation of facilities specified in a mass transit plan adopted pursuant to Article VI hereof, or in any alteration, revision or amendment thereof. Such plan of financing shall specify the facilities to be constructed or acquired, the cost thereof, the principal amount of revenue bonds, equipment trust certificates, and other evidences of debt proposed to be issued, the principal terms and provisions of all loans and underlying agreements and indentures, estimated operating expenses and revenues, and the proposed allocation among the federal, District of Columbia, and participating local governments of the remaining costs and deficits, if any, and such other information as the Commission may consider appropriate.

"(b) Such plan of financing shall constitute a proposal to the interested governments for financial participation and shall not impose any obligation on any government and such obligations shall be created only as provided in Section 18 of this Article VII.

"Commitments for Financial Participation

"18. (a) Commitments on behalf of the portion of the Zone located in Virginia shall be by contract or agreement by the Authority with the Northern Virginia Transportation District, or its component governments, as authorized in the Transportation District Act of 1964 (Ch. 631, 1964 Acts of Virginia Assembly), to contribute to the capital required for the construction and/or acquisition of facilities specified in a mass transit plan adopted as provided in Article VI, or any alteration, revision or amendment thereof, and for meeting expenses and obligations in the operation of such facilities. No such contract or agreement, however, shall be entered into by the Authority with the Northern Virginia Transportation District unless said District has entered into the contracts or agreements with its member governments, as contemplated by Section 1(b)(4) of Article 4 of said Act, which contracts or agreements expressly provide that such contracts or agreements shall inure to the benefit of the Authority and shall be enforceable by the Authority in accordance with the provisions of Section 2, Article 5 of said Act, and such contracts or agreements are acceptable to the Board. The General Assembly of Virginia hereby authorizes and designates the Authority as the agency to plan for and provide transit facilities and services for the area of Virginia encompassed within the Zone within the contemplation of Article 1, Section 3(c) of said Act.

"(b) Commitments on behalf of the portion of the Zone located in Maryland shall be by contract or agreement by the Authority with the Washington Suburban Transit District, pursuant to which the Authority undertakes to provide transit facilities and service in consideration for the agreement by said District to contribute to the capital required for the construction and/or acquisition of facilities specified in a mass transit plan adopted as provided in Article VI, or in any alteration, revision or amendment thereof, and for meeting expenses and obligations incurred in the operation of such facilities.

"(c) With respect to the District of Columbia and the federal government, the commitment or obligation to render financial assistance shall be created by appropriation or in such other manner, or by such other legislation, as the Congress shall determine. If prior to making such commitment by or on behalf of the District of Columbia, legislation is enacted by the Congress granting the governing body of the District of Columbia plenary power to create obligations and levy taxes, the commitment by the District of Columbia shall be by contract or agreement between the governing body of

the District of Columbia and the Authority, pursuant to which the Authority undertakes, subject to the provisions of Section 20 hereof, to provide transit facilities and service in consideration for the undertaking by the District of Columbia to contribute to the capital required for the construction and/or acquisition of facilities specified in a mass transit plan adopted as provided in Article VI, or in any alteration, revision or amendment thereof, and for meeting expenses and obligations incurred in the operation of such facilities.

"Administrative Expenses

"19. Prior to the time the Authority has receipts from appropriations and contracts or agreements as provided in Section 18 of this Article VII, the expenses of the Authority for administration and for preparation of a mass transit and financing plan, including all engineering, financial, legal and other services required in connection therewith, shall, to the extent funds for such expenses are not provided through grants by the federal government, be borne by the District of Columbia, by the Washington Suburban Transit District and the component governments of the Northern Virginia Transportation District. Such expenses shall be allocated among such governments on the basis of population as reflected by the latest available population statistics of the Bureau of the Census; provided, however, that upon the request of any Director the Board shall make the allocation upon estimates of population acceptable to the Board. The allocations shall be made by the Board and shall be included in the annual current expense budget prepared by the Board.

"Acquisition of Facilities from Federal or Other Agencies

"20. (a) The Authority is authorized to acquire by purchase, lease or grant or in any manner other than condemnation, from the federal government, or any agency thereof, from the District of Columbia, Maryland or Virginia, or any political subdivision or agency thereof, any transit and related facilities, including real and personal property and all other assets, located within the Zone, whether in operation or under construction. Such acquisition shall be made upon such terms and conditions as may be agreed upon and subject to such authorization or approval by the Congress and the governing body of the District of Columbia, as may be required; provided, however, that if such acquisition imposes or may impose any further or additional obligation or liability upon the Washington Suburban Transit District, the Northern Virginia Transportation District, or any component government thereof, under any contract with the Authority, the Authority shall not make such acquisition until any such affected contract has been appropriately amended.

"(b) For such purpose, the Authority is authorized to assume all liabilities and contracts relating thereto, to assume responsibility as primary obligor, endorser or guarantor on any outstanding revenue bonds, equipment trust certificates or other form of indebtedness authorized in this Act issued by such predecessor agency or agencies and, in connection therewith, to become a party to, and assume the obligations of, any indenture or loan agreement underlying or issued in connection with any outstanding securities or debts.

"Temporary Borrowing

"21. The Board may borrow, in anticipation of receipts, from any signatory, the Washington Suburban Transit District, the Northern

Virginia Transportation District, or any component government thereof, or from any lending institution for any purposes of this Title, including administrative expenses. Such loans shall be for a term not to exceed two years and at a rate of interest not to exceed six percent per annum. The signatories and any such political subdivision or agency may, in its discretion, make such loans from any available money.

"Funding

"22. The Board shall not construct or acquire any of the transit facilities specified in a mass transit plan adopted pursuant to the provisions of Article VI of this Title, or in any alteration, revision or amendment thereof, nor make any commitments or incur any obligations with respect thereto until funds are available therefor.

"ARTICLE VIII

"BUDGET

"Capital Budget

"23. The Board shall annually adopt a capital budget, including all capital projects it proposes to undertake or continue during the budget period, containing a statement of the estimated cost of each project and the method of financing thereof.

"Current Expense Budget

"24. The Board shall annually adopt a current expense budget for each fiscal year. Such budget shall include the Board's estimated expenditures for administration, operation, maintenance and repairs, debt service requirements and payments to be made into any funds required to be maintained. The total of such expenses shall be balanced by the Board's estimated revenues and receipts from all sources, excluding funds included in the capital budget or otherwise earmarked for other purposes.

"Adoption and Distribution of Budgets

"25. (a) Following the adoption by the Board of annual capital and current expense budgets, the general manager shall transmit certified copies of such budgets to the principal budget officer of the federal government, the District of Columbia, the Washington Suburban Transit District and of the component governments of the Northern Virginia Transportation Commission at such time and in such manner as may be required under their respective budgetary procedures.

"(b) Each budget shall indicate the amounts, if any, required from the federal government, the Government of the District of Columbia, the Washington Suburban Transit District and the component governments of the Northern Virginia Transportation District, determined in accordance with the commitments made pursuant to Article VII, Section 18 of this Title, to balance each of said budgets.

"Payments

"26. Subject to such review and approval as may be required by their budgetary or other applicable processes, the federal government, the Government of the District of Columbia, the Washington Sub-

urban Transit District and the component governments of the Northern Virginia Transportation District shall include in their respective budgets next to be adopted and appropriate or otherwise provide the amounts certified to each of them as set forth in the budgets.

"ARTICLE IX

"REVENUE BONDS

"Borrowing Power

"27. The Authority may borrow money for any of the purposes of this Title, may issue its negotiable bonds and other evidences of indebtedness in respect thereto and may mortgage or pledge its properties, revenues and contracts as security therefor.

"All such bonds and evidences of indebtedness shall be payable solely out of the properties and revenues of the Authority. The bonds and other obligations of the Authority, except as may be otherwise provided in the indenture under which they were issued, shall be direct and general obligations of the Authority and the full faith and credit of the Authority are hereby pledged for the prompt payment of the debt service thereon and for the fulfillment of all other undertakings of the Authority assumed by it to or for the benefit of the holders thereof.

"Funds and Expenses

"28. The purposes of this Title shall include, without limitation, all costs of any project or facility or any part thereof, including interest during a period of construction and for a period not to exceed two years thereafter and any incidental expenses (legal, engineering, fiscal, financial, consultant and other expenses) connected with issuing and disposing of the bonds; all amounts required for the creation of an operating fund, construction fund, reserve fund, sinking fund, or other special fund; all other expenses connected with administration, the planning, design, acquisition, construction, completion, improvement or reconstruction of any facility or any part thereof; and reimbursement of advances by the Board or by others for such purposes and for working capital.

"Credit Excluded; Officers, State, Political Subdivisions and Agencies

"29. The Board shall have no power to pledge the credit of any signatory party, political subdivision or agency thereof, or to impose any obligation for payment of the bonds upon any signatory party, political subdivision or agency thereof, but may pledge the contracts of such governments and agencies; provided, however, that the bonds may be underwritten in whole or in part as to principal and interest by the United States, or by any political subdivision or agency of any signatory; provided, further, that any bonds underwritten in whole or in part as to principal and interest by the United States shall not be issued without approval of the Secretary of the Treasury. Neither the Directors nor any person executing the bonds shall be liable personally on the bonds of the Authority or be subject to any personal liability or accountability by reason of the issuance thereof.

"Funding and Refunding

"30. Whenever the Board deems it expedient, it may fund and refund the bonds and other obligations of the Authority whether or

bonds at less than their par or face value but no issue of bonds may be sold at an aggregate price below the par or face value thereof if such sale would result in a net interest cost to the Authority calculated upon the entire issue so sold of more than six percent per annum payable semiannually, according to standard tables of bond values. All bonds issued and sold pursuant to this Title may be sold in such manner, either at public or private sale, as the Board shall determine.

"Negotiability

"40. All bonds issued under the provisions of this Title are negotiable instruments.

"Bonds Eligible for Investment and Deposit

"41. Bonds issued under the provisions of this Title are hereby made securities in which all public officers and public agencies of the signatories and their political subdivisions and all banks, trust companies, savings and loan associations, investment companies and others carrying on a banking business, all insurance companies and insurance associations and others carrying on an insurance business, all administrators, executors, guardians, trustees and other fiduciaries, and all other persons may legally and properly invest funds, including capital in their control or belonging to them. Such bonds are hereby made securities which may properly and legally be deposited with and received by any officer of any signatory, or of any agency or political subdivision of any signatory, for any purpose for which the deposit of bonds or other obligations of such signatory is now or may hereafter be authorized by law.

"Validation Proceedings

"42. Prior to the issuance of any bonds, the Board may institute a special proceeding to determine the legality of proceedings to issue the bonds and their validity under the laws of any of the signatory parties. Such proceeding shall be instituted and prosecuted in rem and the final judgment rendered therein shall be conclusive against all persons whomsoever and against each of the signatory parties.

"Recording

"43. No indenture need be recorded or filed in any public office, other than the office of the Board. The pledge of revenues provided in any indenture shall take effect forthwith as provided therein and irrespective of the date of receipt of such revenues by the Board of the indenture trustee. Such pledge shall be effective as provided in the indenture without physical delivery of the revenues to the Board or to the indenture trustee.

"Pledged Revenues

"44. Bond redemption and interest payments shall, to the extent provided in the resolution or indenture, constitute a first, direct and exclusive charge and lien on all revenues received from the use and operation of the facility, and on any sinking or other funds created therefrom. All such revenues, together with interest thereon, shall constitute a trust fund for the security and payment of such bonds and except as and to the extent provided in the indenture with re-

spect to the payment therefrom of expenses for other purposes including administration, operation, maintenance, improvements or extensions of the facilities or other purposes shall not be used or pledged for any other purpose so long as such bonds, or any of them, are outstanding and unpaid.

"Remedies

"45. The holder of any bond may for the equal benefit and protection of all holders of bonds similarly situated: (1) by mandamus or other appropriate proceedings require and compel the performance of any of the duties imposed upon the Board or assumed by it, its officers, agents or employees under the provisions of any indenture, in connection with the acquisition, construction, operation, maintenance, repair, reconstruction or insurance of the facilities, or in connection with the collection, deposit, investment, application and disbursement of the revenues derived from the operation and use of the facilities, or in connection with the deposit, investment and disbursement of the proceeds received from the sale of bonds; or (2) by action or suit in a court of competent jurisdiction of any signatory party require the Authority to account as if it were the trustee of an express trust, or enjoin any acts or things which may be unlawful or in violation of the rights of the holders of the bonds. The enumeration of such rights and remedies does not, however, exclude the exercise or prosecution of any other rights or remedies available to the holders of bonds.

"ARTICLE X

"EQUIPMENT TRUST CERTIFICATES

"Power

"46. The Board shall have power to execute agreements, leases and equipment trust certificates with respect to the purchase of facilities or equipment such as cars, trolley buses and motor buses, or other craft, in the form customarily used in such cases and appropriate to effect such purchase, and may dispose of such equipment trust certificates in such manner as it may determine to be for the best interests of the Authority. Each vehicle covered by an equipment trust certificate shall have the name of the owner or lessor plainly marked upon both sides thereof, followed by the words 'Owner and Lessor'.

"Payments

"47. All monies required to be paid by the Authority under the provisions of such agreements, leases and equipment trust certificates shall be payable solely from the revenue to be derived from the operation of the transit system or from such grants, loans, appropriations or other revenues, as may be available to the Board under the provisions of this Title. Payment for such facilities or equipment, or rentals thereof, may be made in installments, and the deferred installments may be evidenced by equipment trust certificates as aforesaid, and title to such facilities or equipment may not vest in the Authority until the equipment trust certificates are paid.

"Procedure

"48. The agreement to purchase facilities or equipment by the Board may direct the vendor to sell and assign the equipment to a bank or

not such bonds and obligations have matured. It may provide for the issuance, sale or exchange of refunding bonds for the purpose of redeeming or retiring any bonds (including the payment of any premium, duplicate interest or cash adjustment required in connection therewith) issued by the Authority or issued by any other issuing body, the proceeds of the sale of which have been applied to any facility acquired by the Authority or which are payable out of the revenues of any facility acquired by the Authority. Bonds may be issued partly to refund bonds and other obligations then outstanding, and partly for any other purpose of the Authority. All provisions of this Title applicable to the issuance of bonds are applicable to refunding bonds and to the issuance, sale or exchange thereof.

"Bonds; Authorization Generally

"31. Bonds and other indebtedness of the Authority shall be authorized by resolution of the Board. The validity of the authorization and issuance of any bonds by the Authority shall not be dependent upon nor affected in any way by: (i) the disposition of bond proceeds by the Board or by contract, commitment or action taken with respect to such proceeds; or (ii) the failure to complete any part of the project for which bonds are authorized to be issued. The Authority may issue bonds in one or more series and may provide for one or more consolidated bond issues, in such principal amounts and with such terms and provisions as the Board may deem necessary. The bonds may be secured by a pledge of all or any part of the property, revenues and franchises under its control. Bonds may be issued by the Authority in such amount, with such maturities and in such denominations and form or forms, whether coupon or registered, as to principal alone or as to both principal and interest, as may be determined by the Board. The Board may provide for redemption of bonds prior to maturity on such notice and at such time or times and with such redemption provisions, including premiums, as the Board may determine.

"Bonds; Resolutions and Indentures Generally

"32. The Board may determine and enter into indentures or adopt resolutions providing for the principal amount, date or dates, maturities, interest rate, or rates, denominations, form, registration, transfer, interchange and other provisions of the bonds and coupons and the terms and conditions upon which the same shall be executed, issued, secured, sold, paid, redeemed, funded and refunded. The resolution of the Board authorizing any bond or any indenture so authorized under which the bonds are issued may include all such covenants and other provisions not inconsistent with the provisions of this Title, other than any restriction on the regulatory powers vested in the Board by this Title, as the Board may deem necessary or desirable for the issue, payment, security, protection or marketing of the bonds, including without limitation covenants and other provisions as to the rates or amounts of fees, rents and other charges to be charged or made for use of the facilities; the use, pledge, custody, securing, application and disposition of such revenues, of the proceeds of the bonds, and of any other moneys or contracts of the Authority; the operation, maintenance, repair and reconstruction of the facilities and the amounts which may be expended therefor; the sale, lease or other disposition of the facilities; the insuring of the facilities and of the revenues derived therefrom; the construction or other acquisition of other facilities; the issuance of additional bonds or other indebtedness; the rights of the bondholders and of any trustee for the bondholders upon

default by the Authority or otherwise; and the modification of the provisions of the indenture and of the bonds. Reference on the face of the bonds to such resolution or indenture by its date of adoption or the apparent date on the face thereof is sufficient to incorporate all of the provisions thereof and of this Title into the body of the bonds and their appurtenant coupons. Each taker and subsequent holder of the bonds or coupons, whether the coupons are attached to or detached from the bonds, has recourse to all of the provisions of the indenture and of this Title and is bound thereby.

"Maximum Maturity

"33. No bond or its terms shall mature in more than fifty years from its own date and in the event any authorized issue is divided into two or more series or divisions, the maximum maturity date herein authorized shall be calculated from the date on the face of each bond separately, irrespective of the fact that different dates may be prescribed for the bonds of each separate series or division of any authorized issue.

"Tax Exemption

"34. All bonds and all other evidences of debt issued by the Authority under the provisions of this Title and the interest thereon shall at all times be free and exempt from all taxation by or under authority of any signatory parties, except for transfer, inheritance and estate taxes.

"Interest

"35. Bonds shall bear interest at a rate of not to exceed six percent per annum, payable annually or semiannually.

"Place of Payment

"36. The Board may provide for the payment of the principal and interest of bonds at any place or places within or without the signatory states, and in any specified lawful coin or currency of the United States of America.

"Execution

"37. The Board may provide for the execution and authentication of bonds by the manual, lithographed or printed facsimile signature of members of the Board, and by additional authentication by a trustee or fiscal agent appointed by the Board; provided, however, that one of such signatures shall be manual. If any of the members whose signatures or countersignatures appear upon the bonds or coupons cease to be members before the delivery of the bonds or coupons, their signatures or countersignatures are nevertheless valid and of the same force and effect as if the members had remained in office until the delivery of the bonds and coupons.

"Holding Own Bonds

"38. The Board shall have power out of any funds available therefor to purchase its bonds and may hold, cancel or resell such bonds.

"Sale

"39. The Board may fix terms and conditions for the sale or other disposition of any authorized issue of bonds. The Board may sell

trust company, duly authorized to transact business in any of the signatory States, or to the Housing and Home Finance Administrator, as trustee, lessor or vendor, for the benefit and security of the equipment trust certificates and may direct the trustee to deliver the facilities and equipment to one or more designated officers of the Board and may authorize the trustee simultaneously therewith to execute and deliver a lease of the facilities or equipment to the Board.

"Agreements and Leases

"49. The agreements and leases shall be duly acknowledged before some person authorized by law to take acknowledgements of deeds and in the form required for acknowledgement of deeds and such agreements, leases, and equipment trust certificates shall be authorized by resolution of the Board and shall contain such covenants, conditions and provisions as may be deemed necessary or appropriate to insure the payment of the equipment trust certificates from the revenues to be derived from the operation of the transit system and other funds.

"The covenants, conditions and provisions of the agreements, leases and equipment trust certificates shall not conflict with any of the provisions of any resolution or trust agreement securing the payment of bonds or other obligations of the Authority then outstanding or conflict with or be in derogation of the rights of the holders of any such bonds or other obligations.

"Law Governing

"50. The equipment trust certificates issued hereunder shall be governed by Laws of the District of Columbia and for this purpose the chief place of business of the Authority shall be considered to be the District of Columbia. The filing of any documents required or permitted to be filed shall be governed by the Laws of the District of Columbia.

"ARTICLE XI

"OPERATION OF FACILITIES

"Operation by Contract or Lease

"51. The Authority shall not perform transit service, nor any of the functions, such as maintenance of equipment and right of way normally associated with the providing of such service, with any transit facilities owned or controlled by it but shall provide for the performance of transit service with such facilities by contract or contracts with private transit companies, private railroads, or other persons. Any facilities and properties owned or controlled by the Authority, other than those utilized in performing transit service, may be operated by the Authority or by others pursuant to contract or lease as the Board may determine. All operations of such facilities and properties by the Authority and by its Contractor and lessees shall be within the Zone.

"The Operating Contract

"52. Without limitation upon the right of the Board to prescribe such additional terms and provisions as it may deem necessary and appropriate, the operating contract shall;

"(a) specify the services and functions to be performed by the Contractor;

"(b) provide that the Contractor shall hire, supervise and control all personnel required to perform the services and functions assumed by it under the operating contract and that all such personnel shall be employees of the Contractor and not of the Authority;

"(c) require the Contractor to assume the obligations of the labor contract or contracts of any transit company which may be acquired by the Authority and assume the pension obligations of any such transit company;

"(d) require the Contractor to comply in all respects with the labor policy set forth in Article XIV of this Title;

"(e) provide that no transfer of ownership of the capital stock, securities or interests in any Contractor, whose principal business is the operating contract, shall be made without written approval of the Board and the certificates or other instruments representing such stock, securities or interests shall contain a statement of this restriction;

"(f) provide that the Board shall have the sole authority to determine the rates or fares to be charged, the routes to be operated and the service to be furnished;

"(g) specify the obligations and liabilities which are to be assumed by the Contractor and those which are to be the responsibility of the Authority;

"(h) provide for an annual audit of the books and accounts of the Contractor by an independent certified public accountant to be selected by the Board and for such other audits, examinations and investigations of the books and records, procedures and affairs of the Contractor at such times and in such manner as the Board shall require, the cost of such audits, examinations and investigations to be borne as agreed by the parties in the operating contract; and

"(i) provide that no operating contract shall be entered into for a term in excess of five years; provided, that any such contract may be renewed for successive terms, each of which shall not exceed five years. Any such operating contract shall be subject to termination by the Board for cause only.

"Compensation for Contractor

"53. Compensation to the Contractor under the operating contract may, in the discretion of the Board, be in the form of (1) a fee paid by the Board to the Contractor for services, (2) a payment by the Contractor to the Board for the right to operate the system, or (3) such other arrangement as the Board may prescribe; provided, however, that the compensation shall bear a reasonable relationship to the benefits to the Authority and to the estimated costs the Authority would incur in directly performing the functions and duties delegated under the operating contract; and provided, further, that no such contract shall create any right in the Contractor (1) to make or change any rate or fare or alter or change the service specified in the contract to be provided or (2) to seek judicial relief by any form of original action, review or other proceedings from any rate or fare or service prescribed by the Board. Any assertion, or attempted assertion, by the Contractor of the right to make or change any rate or fare or service prescribed by the Board shall constitute cause for termination of the operating contract. The operating contract may provide incentives for efficient and economical management.

"Selection of Contractor

"54. The Board shall enter into an operating contract only after formal advertisement and negotiations with all interested and quali-

fied parties, including private transit companies rendering transit service within the Zone; provided, however, that, if the Authority acquires transit facilities from any agency of the federal or District of Columbia governments, in accordance with the provisions of Article VII, Section 20 of this Title, the Authority shall assume the obligations of any operating contract which the transferor agency may have entered into.

"ARTICLE XII

"COORDINATION OF PRIVATE AND PUBLIC FACILITIES

"Declaration of Policy

"55. It is hereby declared that the interest of the public in efficient and economical transit service and in the financial well-being of the Authority and of the private transit companies requires that the public and private segments of the regional transit system be operated, to the fullest extent possible, as a coordinated system without unnecessary duplicating service.

"Implementation of Policy

"56. In order to carry out the legislative policy set forth in Section 55 of this Article XII

"(a) The Authority—

"(1) except as herein provided, shall not, directly or through a Contractor, perform transit service by bus or similar motor vehicles;

"(2) shall, in cooperation with the private carriers and WMATC, coordinate to the fullest extent practicable, the schedules for service performed by its facilities with the schedules for service performed by private carriers; and

"(3) shall enter into agreements with the private carriers to establish and maintain, subject to approval by WMATC, through routes and joint fares and provide for the division thereof, or, in the absence of such agreements, establish and maintain through routes and joint fares in accordance with orders issued by WMATC directed to the private carriers when the terms and conditions for such through service and joint fares are acceptable to it.

"(b) The WMATC, upon application, complaint, or upon its own motion, shall—

"(1) direct private carriers to coordinate their schedules for service with the schedules for service performed by facilities owned or controlled by the Authority;

"(2) direct private carriers to improve or extend any existing services or provide additional service over additional routes;

"(3) authorize a private carrier, pursuant to agreement between said carrier and the Authority, to establish and maintain through routes and joint fares for transportation to be rendered with facilities owned or controlled by the Authority if, after hearing held upon reasonable notice, WMATC finds that such through routes and joint fares are required by the public interest; and

"(4) in the absence of such an agreement with the Authority, direct a private carrier to establish and maintain through routes and joint fares with the Authority, if, after hearing held upon reasonable notice, WMATC finds that such through service and joint

fares are required by the public interest; provided, however, that no such order, rule or regulation of WMATC shall be construed to require the Authority to establish and maintain any through route and joint fare.

"(c) WMATC shall not authorize or require a private carrier to render any service, including the establishment or continuation of a joint fare for a through route service with the Authority which is based on a division thereof between the Authority and private carrier which does not provide a reasonable return to the private carrier, unless the carrier is currently earning a reasonable return on its operation as a whole in performing transportation subject to the jurisdiction of WMATC. In determining the issue of reasonable return, WMATC shall take into account any income attributable to the carrier, or to any corporation, firm or association owned in whole or in part by the carrier, from the Authority whether by way of payment for services or otherwise.

"(d) If the WMATC is unable, through the exercise of its regulatory powers over the private carriers granted in paragraph (b) hereof or otherwise, to bring about the requisite coordination of operations and service between the private carriers and the Authority, the Authority may in the situations specified in paragraph (b) hereof, cause such transit service to be rendered by its Contractor by bus or other motor vehicle, as it shall deem necessary to effectuate the policy set forth in Section 55 hereof. In any such situation, the Authority, in order to encourage private carriers to render bus service to the fullest extent practicable, may, pursuant to agreement, make reasonable subsidy payments to any private carrier.

"Rights of Private Carriers Unaffected

"57. Nothing in this Title shall restrict or limit such rights and remedies, if any, that any private carrier may have against the Authority arising out of acts done or actions taken by the Authority hereunder. In the event any court of competent jurisdiction shall determine that the Authority has unlawfully infringed any rights of any private carrier or otherwise caused or permitted any private carrier to suffer legally cognizable injury, damages or harm and shall award a judgment therefor, such judgment shall constitute a lien against any and all of the assets and properties of the Authority.

"Financial Assistance to Private Carriers

"58. (a) The Board may accept grants from and enter into loan agreements with the Housing and Home Finance Administrator, pursuant to the provisions of the Urban Mass Transportation Act of 1964 (78 Stat. 302), or with any successor agency or under any law of similar purport, for the purpose of rendering financial assistance to private carriers. 49 USC 1601 note.

"(b) An application by the Board for any such grant or loan shall be based on and supported by a report from WMATC setting forth for each private carrier to be assisted (1) the equipment and facilities to be acquired, constructed, reconstructed, or improved, (2) the service proposed to be rendered by such equipment and facilities, (3) the improvement in service expected from such facilities and equipment, (4) how the use of such facilities and equipment will be coordinated with the transit facilities owned by the Authority, (5) the

ability of the affected private carrier to repay any such loans or grants and (6) recommend terms for any such loans or grants.

"(c) Any equipment or facilities acquired, constructed, reconstructed or improved with the proceeds of such grants or loans shall be owned by the Authority and may be made available to private carriers only by lease or other agreement which contain provisions acceptable to the Housing and Home Finance Administrator assuring that the Authority will have satisfactory continuing control over the use of such facilities and equipment.

"ARTICLE XIII

"JURISDICTION; RATES AND SERVICE

"Washington Metropolitan Area Transit Commission

"59. Except as provided herein, this Title shall not affect the functions and jurisdiction of WMATC, as granted by Titles I and II of this Compact, over the transportation therein specified and the persons engaged therein and the Authority shall have no jurisdiction with respect thereto.

"Public Facilities

"60. Service performed by transit facilities owned or controlled by the Authority, and the rates and fares to be charged for such service, shall be subject to the sole and exclusive jurisdiction of the Board and, notwithstanding any other provision in this Compact contained, WMATC shall have no authority with respect thereto, or with respect to any contractor in connection with the operation by it of transit facilities owned or controlled by the Authority. The determinations of the Board with respect to such matters shall not be subject to judicial review nor to the processes of any court.

"Standards

"61. Insofar as practicable, and consistent with the provision of adequate service at reasonable fares, the rates and fares and service shall be fixed by the Board so as to result in revenues which will:

"(a) pay the operating expenses and provide for repairs, maintenance and depreciation of the transit system owned or controlled by the Authority;

"(b) provide for payment of all principal and interest on outstanding revenue bonds and other obligations and for payment of all amounts to sinking funds and other funds as may be required by the terms of any indenture or loan agreement;

"(c) provide for the purchase, lease or acquisition of rolling stock, including provisions for interest, sinking funds, reserve funds, or other funds required for payment of any obligations incurred by the Authority for the acquisition of rolling stock; and

"(d) provide funds for any purpose the Board deems necessary and desirable to carry out the purposes of this Title.

"Hearings

"62. (a) The Board shall not make or change any fare or rate, nor establish or abandon any service except after holding a public hearing with respect thereto.

"(b) Any signatory, any political subdivision thereof, any agency of the federal government and any person, firm or association served by or using the transit facilities of the Authority and any private carrier may file a request with the Board for a hearing with respect to any rates or charges made by the Board or any service rendered with the facilities owned or controlled by the Authority. Such request shall be in writing, shall state the matter on which a hearing is requested and shall set forth clearly the matters and things on which the request relies. As promptly as possible after such a request is filed, the Board, or such officer or employee as it may designate, shall confer with the protestant with respect to the matters complained of. After such conference, the Board, if it deems the matter meritorious and of general significance, may call a hearing with respect to such request.

"(c) The Board shall give at least thirty days' notice for all hearings. The notice shall be given by publication in a newspaper of daily circulation throughout the Zone and such notice shall be published once a week for two successive weeks. The notice shall start with the day of first publication. In addition, the Board shall post notices of the hearing in its offices, all stations and terminals, and in all of its vehicles and rolling stock in revenue service.

"(d) Prior to calling a hearing on any matter specified in this section, the Board shall prepare and file at its main office and keep open for public inspection its report relating to the proposed action to be considered at such hearing. Upon receipt by the Board of any report submitted by WMATC, in connection with a matter set for hearing, pursuant to the provisions of Section 63 of this Article XIII, the Board shall file such report at its main office and make it available for public inspection. For hearings called by the Board pursuant to paragraph (b), above, the Board also shall cause to be lodged and kept open for public inspection the written request upon which the hearing is granted and all documents filed in support thereof.

"Reference of Matters to WMATC

"63. To facilitate the attainment of the public policy objectives for operation of the publicly and privately owned or controlled transit facilities as stated in Article XII, Section 55, prior to the hearings provided for by Section 62 hereof—

"(a) The Board shall refer to WMATC for its consideration and recommendations, any matter which the Board considers may affect the operation of the publicly and privately owned or controlled transit facilities as a coordinated regional transit system and any matter for which the Board has called a hearing, pursuant to Section 62 of this Article XIII, except that temporary or emergency changes in matters affecting service shall not be referred; and

"(b) WMATC, upon such reference of any matter to it, shall give the referred matter preference over any other matters pending before it and shall, as expeditiously as practicable, prepare and transmit its report thereon to the Board. The Board may request WMATC to reconsider any part of its report or to make any supplemental reports it deems necessary. All of such reports shall be advisory only.

"(c) Any report submitted by WMATC to the Board shall consider, without limitation, the probable effect of the matter or proposal upon the operation of the publicly and privately owned or controlled transit facilities as a coordinated regional system, passenger movements, fare structures, service and the impact on the revenues of both the public and private facilities.

"ARTICLE XIV

"LABOR POLICY

"Construction

"64. The Board shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors in the construction, alteration or repair, including painting and decorating, of projects, buildings and works which are undertaken by the Authority or are financially assisted by it, shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a—276a-5), and every such employee shall receive compensation at a rate not less than one and one-half times his basic rate of pay for all hours worked in any workweek in excess of eight hours in any workday or forty hours in any workweek, as the case may be. A provision stating the minimum wages thus determined and the requirement that overtime be paid as above provided shall be set out in each project advertisement for bids and in each bid proposal form and shall be made a part of the contract covering the project, which contract shall be deemed to be a contract of the character specified in Section 103 of the Contract Work Hours Standards Act (76 Stat. 357), as now or as may hereafter be in effect. The Secretary of Labor shall have, with respect to the administration and enforcement of the labor standards specified in this provision, the supervisory, investigatory and other authority and functions set forth in Reorganization Plan Number 14 of 1950 (15 F.R. 3176, 64 Stat. 1267, 5 U.S.C. 133z-15), and section 2 of the Act of June 13, 1934, as amended (48 Stat. 948, as amended; 40 U.S.C. 276(c)). The requirements of this section shall also be applicable with respect to the employment of laborers and mechanics in the construction, alteration or repair, including painting and decorating, of the transit facilities owned or controlled by the Authority where such activities are performed by a Contractor pursuant to agreement with the operator of such facilities.

"Equipment and Supplies

"65. Contracts for the manufacture or furnishing of materials, supplies, articles and equipment shall be subject to the provisions of the Walsh-Healey Public Contracts Act (41 U.S.C. 35 et seq.), as now or as may hereafter be in effect.

"Operations

"66. It shall be a condition of the operation of the transit facilities owned or controlled by the Authority that the provisions of section 10(c) of the Urban Mass Transportation Act of 1964 (49 U.S.C. 1609(c)) shall be applicable to any contract or other arrangement for the operation of such facilities.

"ARTICLE XV

"RELOCATION ASSISTANCE

"Relocation Program and Payments

"67. Section 7 of the Urban Mass Transportation Act of 1964, and as the same may from time to time be amended, and all regulations promulgated thereunder, are hereby made applicable to individuals,

families, business concerns and nonprofit organizations displaced from real property by actions of the Authority without regard to whether financial assistance is sought by or extended to the Authority under any provision of that Act; provided, however, that in the event real property is acquired for the Authority by an agency of the federal government, or by a State or local agency or instrumentality, the Authority is authorized to reimburse the acquiring agency for relocation payments made by it.

"Relocation of Public or Public Utility Facilities

"68. Notwithstanding the provisions of Section 67 of this article XV, any highway or other public facility or any facilities of a public utility company which will be dislocated by reason of a project deemed necessary by the Board to effectuate the authorized purposes of this Title shall be relocated if such facilities are devoted to a public use, and the reasonable cost of relocation, if substitute facilities are necessary, shall be paid by the Board from any of its monies.

"ARTICLE XVI

"GENERAL PROVISIONS

"Creation and Administration of Funds

"69. (a) The Board may provide for the creation and administration of such funds as may be required. The funds shall be disbursed in accordance with rules established by the Board and all payments from any fund shall be reported to the Board. Monies in such funds and other monies of the Authority shall be deposited, as directed by the Board, in any state or national bank located in the Zone having a total paid-in capital of at least one million dollars ($1,000,000). The trust department of any such state or national bank may be designated as a depositary to receive any securities acquired or owned by the Authority. The restriction with respect to paid-in capital may be waived for any such bank which agrees to pledge federal securities to protect the funds and securities of the Authority in such amounts and pursuant to such arrangements as may be acceptable to the Board.

"(b) Any monies of the Authority may, in the discretion of the Board and subject to any agreement or covenant between the Authority and the holders of any of its obligations limiting or restricting classes of investments, be invested in bonds or other obligations of, or guaranteed as to interest and principal by, the United States, Maryland, Virginia or the political subdivisions or agencies thereof.

"Annual Independent Audit

"70. (a) As soon as practical after the closing of the fiscal year, an audit shall be made of the financial accounts of the Authority. The audit shall be made by qualified certified public accountants selected by the Board, who shall have no personal interest direct or indirect in the financial affairs of the Authority or any of its officers or employees. The report of audit shall be prepared in accordance with generally accepted auditing principles and shall be filed with the Chairman and other officers as the Board shall direct. Copies of the report shall be distributed to each Director, to the Congress, to the Board of Commissioners of the District of Columbia, to the Governors of Virginia and Maryland, to the Washington Suburban Transit Commission, to

the Northern Virginia Transportation Commission and to the governing bodies of the political subdivisions located within the Zone which are parties to commitments for participation in the financing of the Authority and shall be made available for public distribution.

"(b) The financial transactions of the Board shall be subject to audit by the United States General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States. The audit shall be conducted at the place or places where the accounts of the Board are kept.

"(c) Any Director, officer or employee who shall refuse to give all required assistance and information to the accountants selected by the Board or who shall refuse to submit to them for examination such books, documents, records, files, accounts, papers, things or property as may be requested shall, in the discretion of the Board forfeit his office.

"Reports

"71. The Board shall make and publish an annual report on its programs, operations and finances, which shall be distributed in the same manner provided by Section 70 of this Article XVI for the report of annual audit. It may also prepare, publish and distribute such other public reports and informational materials as it may deem necessary or desirable.

"Insurance

"72. The Board may self-insure or purchase insurance and pay the premiums therefore against loss or damage to any of its properties; against liability for injury to persons or property; and against loss of revenue from any cause whatsoever. Such insurance coverage shall be in such form and amount as the Board may determine, subject to the requirements of any agreement arising out of issuance of bonds or other obligations by the Authority.

"Purchasing

"73. Contracts for the construction, reconstruction or improvement of any facility when the expenditure required exceeds ten thousand dollars ($10,000) and contracts for the purchase of supplies, equipment and materials when the expenditure required exceeds two thousand five hundred dollars ($2,500) shall be advertised and let upon sealed bids to the lowest responsible bidder. Notice requesting such bids shall be published in a manner reasonably likely to attract prospective bidders, which publication shall be made at least ten days before bids are received and in at least two newspapers of general circulation in the Zone. The Board may reject any and all bids and readvertise in its discretion. If after rejecting bids the Board determines and resolves that, in its opinion, the supplies, equipment and materials may be purchased at a lower price in the open market, the Board may give each responsible bidder an opportunity to negotiate a price and may proceed to purchase the supplies, equipment and materials in the open market at a negotiated price which is lower than the lowest rejected bid of a responsible bidder, without further observance of the provisions requiring bids or notice. The Board shall adopt rules and regulations to provide for purchasing from the lowest responsible bidder when sealed bids, notice and publication are not

required by this section. The Board may suspend and waive the provisions of this section requiring competitive bids whenever:

"(a) the purchase is to be made from or the contract is to be made with the federal or any State government or any agency or political subdivision thereof or pursuant to any open end bulk purchase contract of any of them;

"(b) the public exigency requires the immediate delivery of the articles;

"(c) only one source of supply is available; or

"(d) the equipment to be purchased is of a technical nature and the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts in the public interest.

"Rights of Way

"74. The Board is authorized to locate, construct and maintain any of its transit and related facilities in, upon, over, under or across any streets, highways, freeways, bridges and any other vehicular facilities, subject to the applicable laws governing such use of such facilities by public agencies. In the absence of such laws, such use of such facilities by the Board shall be subject to such reasonable conditions as the highway department or other affected agency of a signatory party may require; provided, however, that the Board shall not construct or operate transit or related facilities upon, over, or across any parkways or park lands without the consent of, and except upon the terms and conditions required by, the agency having jurisdiction with respect to such parkways and park lands, but may construct or operate such facilities in a subway under such parkways or park lands upon such reasonable terms and conditions as may be specified by the agency having jurisdiction with respect thereto.

"Compliance with Laws, Regulations and Ordinances

"75. The Board shall comply with all laws, ordinances and regulations of the signatories and political subdivisions and agencies thereof with respect to use of streets, highways and all other vehicular facilities, traffic control and regulation, zoning, signs and buildings.

"Police

"76. The Board is authorized to employ watchmen, guards and investigators as it may deem necessary for the protection of its properties, personnel and passengers and such employees, when authorized by any jurisdiction within the Zone, may serve as special police officers in any such jurisdiction. Nothing contained herein shall relieve any signatory or political subdivision or agency thereof from its duty to provide police service and protection or to limit, restrict or interfere with the jurisdiction of or performance of duties by the existing police and law enforcement agencies.

"Exemption from Regulation

"77. Except as otherwise provided in this Title, any transit service rendered by transit facilities owned or controlled by the Authority and the Authority or any corporation, firm or association performing such transit service pursuant to an operating contract with the Authority, shall, in connection with the performance of such service, be exempt from all laws, rules, regulations and orders of the signatories

and of the United States otherwise applicable to such transit service and persons, except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect; provided, however, that the Board may promulgate regulations for the safety of the public and employees not inconsistent with the applicable laws, rules, regulations or orders of the signatories and of the United States.

"Tax Exemption

"78. It is hereby declared that the creation of the Authority and the carrying out of the corporate purposes of the Authority is in all respects for the benefit of the people of the signatory states and is for a public purpose and that the Authority and the Board will be performing an essential governmental function, including, without limitation, proprietary, governmental and other functions, in the exercise of the powers conferred by this Title. Accordingly, the Authority and the Board shall not be required to pay taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision or upon its activities in the operation and maintenance of any transit facilities or upon any revenues therefrom and the property and income derived therefrom shall be exempt from all federal, State, District of Columbia, municipal and local taxation. This exemption shall include, without limitation, all motor vehicle license fees, sales taxes and motor fuel taxes.

"Free Transportation and School Fares

"79. All laws of the signatories with respect to free transportation and school fares shall be applicable to transit service rendered by facilities owned or controlled by the Authority.

"Liability for Contracts and Torts

"80. The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

"Jurisdiction of Courts

"81. The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

"Condemnation

"82. (a) The Authority shall have the power to acquire by condemnation, whenever in its opinion it is necessary or advantageous to the Authority to do so, any real or personal property, or any in-

terest therein, necessary or useful for the transit system authorized herein, except property owned by the United States, by a signatory, or any political subdivision thereof, or by a private transit company.

"(b) Proceedings for the condemnation of property in the District of Columbia shall be instituted and maintained under the Act of December 23, 1963 (77 Stat. 577–581, D. C. Code 1961, Supp. IV, Sections 1351–1368). Proceedings for the condemnation of property located elsewhere within the Zone shall be instituted and maintained, if applicable, pursuant to the provisions of the Act of August 1, 1888, as amended (25 Stat. 357, 40 U.S.C. 257) and the Act of June 25, 1948 (62 Stat. 935 and 937, 28 U.S.C. 1358 and 1403) or any other applicable Act; provided, however, that if there is no applicable Federal law, condemnation proceedings shall be in accordance with the provisions of the State law of the signatory in which the property is located governing condemnation by the highway agency of such state. Whenever the words 'real property,' 'realty,' 'land,' 'easement,' 'right-of-way,' or words of similar meaning are used in any applicable federal or state law relating to procedure, jurisdiction and venue, they shall be deemed, for the purposes of this Title, to include any personal property authorized to be acquired hereunder. 62 Stat. 986.

"(c) Any award or compensation for the taking of property pursuant to this Title shall be paid by the Authority, and none of the signatory parties nor any other agency, instrumentality or political subdivision thereof shall be liable for such award or compensation.

"Enlargement and Withdrawal; Duration

"83. (a) When advised in writing by the Northern Virginia Transportation Commission or the Washington Suburban Transit Commission that the geographical area embraced therein has been enlarged, the Board, upon such terms and conditions as it may deem appropriate, shall by resolution enlarge the Zone to embrace the additional area.

"(b) The duration of this Title shall be perpetual but any signatory thereto may withdraw therefrom upon two years' written notice to the Board.

"(c) The withdrawal of any signatory shall not relieve such signatory, any transportation district, county or city or other political subdivision thereof from any obligation to the Authority, or inuring to the benefit of the Authority, created by contract or otherwise.

"Amendments and Supplements

"84. Amendments and supplements to this Title to implement the purposes thereof may be adopted by legislative action of any of the signatory parties concurred in by all of the others.

"Construction and Severability

"85. The provisions of this Title and of the agreements thereunder shall be severable and if any phrase, clause, sentence or provision of this Title or any such agreement is declared to be unconstitutional or the applicability thereof to any signatory party, political subdivision or agency thereof is held invalid, the constitutionality of the remainder of this Title or any such agreement and the applicability thereof to any other signatory party, political subdivision or agency thereof

or circumstance shall not be affected thereby. It is the legislative intent that the provisions of this Title be reasonably and liberally construed.

"Effective Date; Execution

"86. This Title shall be adopted by the signatories in the manner provided by law therefor and shall be signed and sealed in four duplicate original copies. One such copy shall be filed with the Secretary of State of each of the signatory parties or in accordance with laws of the State in which the filing is made, and one copy shall be filed and retained in the archives of the Authority upon its organization. This Title shall become effective ninety days after the enactment of concurring legislation by or on behalf of the District of Columbia, Maryland and Virginia and consent thereto by the Congress and all other acts or actions have been taken, including the signing and execution of the Title by the Governors of Maryland and Virginia and the Commissioners of the District of Columbia."

Section 2. The Commissioners of the District of Columbia are authorized and directed to enter into and execute an amendment to the Compact substantially as set forth above with the States of Virginia and Maryland and are further authorized and directed to carry out and effectuate the terms and provisions of said Title III, and there are hereby authorized to be appropriated out of District of Columbia funds such amounts as are necessary to carry out the obligations of the District of Columbia in accordance with the terms of the said Title III.

Section 3. (a) To assure uninterrupted progress in the development of the facilities authorized by the National Capital Transportation Act of 1965, the transfer of the functions and duties of the National Capital Transportation Agency (herein referred to as the Agency) to the Washington Metropolitan Area Transit Authority (herein referred to as the Authority) as required by Section 301(b) of the National Capital Transportation Act of 1960 shall take place on September 30, 1967.

(b) Upon the effective date of the transfer of functions and duties authorized by subsection (a) of this section, the President is authorized to transfer to the Authority such real and personal property, studies, reports, records, and other assets and liabilities as are appropriate in order that the Authority may assume the functions and duties of the Agency and, further, the President shall make provision for the transfer to the Authority of the unexpended balance of the appropriations, and of other funds, of the Agency for use by the Authority but such unexpended balances so transferred shall be used only for the purpose for which such appropriations were originally made. Subsequent to said effective date, there is authorized to be appropriated to the Department of Housing and Urban Development, for payment to the Authority, any unappropriated portion of the authorization specified in Section 5(a)(1) of the National Capital Transportation Act of 1965. There is also authorized to be appropriated to the District of Columbia out of the general fund of the District of Columbia, for payment to the Authority, any unappropriated portion of the authorization specified in section 5(a)(2) of such Act. Any such appropriations shall be used only for the purposes for which such authorizations were originally made.

(c) Pending the assumption by the Authority of the functions and duties of the Agency, the Agency is authorized and directed, in the manner herein set forth, fully to cooperate with and assist the Authority, the Northern Virginia Transportation Commission and the Washington Suburban Transit Commission in the development of

plans for the extensions, new lines and related facilities required to expand the basic system authorized by the National Capital Transportation Act of 1965 into a regional system, but, pending such transfer of functions and duties, nothing in this Act shall be construed to impair the performance by the Agency of the functions and duties imposed by the National Capital Transportation Act of 1965.

79 Stat. 663.
40 USC 681 note.

(d) In order to provide the cooperation and assistance specified in subsection (c) of this section, the Agency is authorized to perform, on a reimbursable basis, planning, engineering and such other services for the Authority, as the Authority may request, or to obtain such services by contract, but all such assistance and services shall be rendered in accordance with policy determinations made by the Authority and shall be advisory only.

Planning and engineering services.

(e) Amounts received by the Agency from the Authority as provided in subsection (d) of this section shall be available for expenditure by the Agency in performing services for the Authority.

Section 4. The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority and to enforce subpoenas issued pursuant to the provisions of Title III. Any such action initiated in a State court shall be removable to the appropriate United States District Court in the manner provided by the Act of June 25, 1948, as amended (28 U.S.C. 1446).

Jurisdiction of courts.

62 Stat. 939; 63 Stat. 101.

Section 5. (a) All laws or parts of laws of the United States and of the District of Columbia inconsistent with the provisions of Title III of this Act are hereby amended for the purpose of this Act to the extent necessary to eliminate such inconsistencies and to carry out the provisions of this Act and Title III and all laws or parts of laws and all reorganization plans of the United States are hereby amended and made applicable for the purpose of this Act to the extent necessary to carry out the provisions of this Act and Title III.

(b) Section 202 of the National Capital Transportation Act of 1960 (Public Law 86–669, 74 Stat. 537), as amended by Section 7 of the National Capital Transportation Act of 1965 (Public Law 89–173, 79 Stat. 666) is hereby repealed.

Advisory Board. Repeal.

40 USC 662.

Section 6. (a) The right to alter, amend or repeal this Act is hereby expressly reserved.

(b) The Authority shall submit to Congress and the President copies of all annual and special reports made to the Governors, the Commissioners of the District of Columbia and/or the legislatures of the compacting States.

Reports to Congress.

(c) The President and the Congress or any committee thereof shall have the right to require the disclosure and furnishing of such information by the Authority as they may deem appropriate. Further, the President and Congress or any of its committees shall have access to all books, records and papers of the Authority as well as the right of inspection of any facility used, owned, leased, regulated or under the control of said Authority.

Information, availability.

(d) In carrying out the audits provided for in section 70(b) of the Compact the representatives of the General Accounting Office shall have access to all books, accounts, financial records, reports, files, and all other papers, things, or property belonging to or in use by the Board and necessary to facilitate the audit, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, agents, and custodians.

GAO audits.
Ante, p. 134.

Approved November 6, 1966.

THE FEDERALIST NO. 81

A Further View of the Judicial Department in Relation
to the Distribution of Its Authority
by Alexander Hamilton

LET US now return to the partition of the judiciary authority between different courts, and their relations to each other.

"The judicial power of the United States is" (by the plan of the convention) "to be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."{1}

That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested. The reasons have been assigned in another place, and are too obvious to need repetition. The only question that seems to have been raised concerning it, is, whether it ought to be a distinct body or a branch of the legislature. The same contradiction is observable in regard to this matter which has been remarked in several other cases. The very men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes, in the whole or in a part of the legislative body.

The arguments, or rather suggestions, upon which this charge is founded, are to this effect: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the spirit of the Constitution, will enable that court to mold them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of

Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless." This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but form the general theory of a limited Constitution; and as far as it is true, is equally applicable to most, if not to all the State governments. There can be no objection, therefore, on this account, to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the Supreme Court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of the State. To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a part of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in

the application. The same spirit which had operated in making them, would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges. Nor is this all. Every reason which recommends the tenure of good behavior for judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshaled on opposite sides will be too apt to stifle the voice both of law and of equity.

These considerations teach us to applaud the wisdom of those States who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitution of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to those models is highly to be commended.

It is not true, in the second place, that the Parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The

theory, neither of the British, nor the State constitutions, authorizes the revisal of a judicial sentence by a legislative act. Nor is there any thing in the proposed Constitution, more than in either of them, by which it is forbidden. In the former, as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding is province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent, to the State governments, as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support it usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.

Having now examined, and, I trust, removed the objections to

the distinct and independent organization of the Supreme Court, I proceed to consider the propriety of the power of constituting inferior courts,{2} and the relations which will subsist between these and the former.

The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or authorize, in each State or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude, yet the substance of the power in question may still be regarded as a necessary part of the plan, if it were only to empower the national legislature to commit to them the cognizance of causes arising out of the national Constitution. To confer the power of determining such causes upon the existing courts of the several States, would perhaps be as much "to constitute tribunals," as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognizance of causes arising under those laws to them, there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or distrust of, the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction, in the several

classes of causes to which it is extended by the plan of the convention. I should consider every thing calculated to give, in practice, and unrestrained course to appeals, as a source of public and private inconvenience.

I am not sure, but that it will be found highly expedient and useful, to divide the United States into four or five or half a dozen districts; and to institute a federal court in each district, in lieu of one in every State. The judges of these courts, with the aid of the State judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and despatch; and appeals may be safely circumscribed within a narrow compass. This plan appears to me at present the most eligible of any that could be adopted; and in order to it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is to be found in the proposed Constitution.

These reasons seem sufficient to satisfy a candid mind, that the want of such a power would have been a great defect in the plan. Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the Union.

The Supreme Court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party." Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in a strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.

Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

Let us resume the train of our observations. We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes, and those of a nature rarely to occur. In all

other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction, "with such exceptions and under such regulations as the Congress shall make."

The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact. Some well-intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favor of the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery. A technical sense has been affixed to the term "appellate," which, in our law parlance, is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New England. There an appeal from one jury to another, is familiar both in language and practice, is even a matter of course, until there have been two verdicts on one side. The word "appellate," therefore, will not be understood in the same sense in new England as in New York, which shows the impropriety of a technical interpretation derived from the jurisprudence of any particular State. The expression, taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision (in a new government it must depend on the latter), and may be with or without the aid of a jury, as may be judged advisable. If, therefore, the re-examination of a fact once determined by a jury, should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.

But it does not follow that the re-examination of a fact once ascertained by a jury, will be permitted in the Supreme Court. Why may not it be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this State, that

the latter has jurisdiction of the fact as well as the law? It is true it cannot institute a new inquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it.{3} This is jurisdiction of both fact and law; nor is it even possible to separate them. Though the common-law courts of this State ascertain disputed facts by a jury, yet they unquestionably have jurisdiction of both fact and law; and accordingly when the former is agreed in the pleadings, they have no recourse to a jury, but proceed at once to judgment. I contend, therefore, on this ground, that the expressions, "appellate jurisdiction, both as to law and fact," do not necessarily imply a re-examination in the Supreme Court of facts decided by juries in the inferior courts.

The following train of ideas may well be imagined to have influenced the convention, in relation to this particular provision. The appellate jurisdiction of the Supreme Court (it may have been argued) will extend to causes determinable in different modes, some in the course of the COMMON LAW, others in the course of the CIVIL LAW. In former, the revision of the law only will be, generally speaking, the proper province of the Supreme Court; in the latter, the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. It is therefore necessary that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States all causes are tried in this mode;{4} and such an exception would preclude the revision of matters of fact, as well where it might be proper, as where it might be improper. To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate, puts it out of all doubt

that the supposed abolition of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been preserved to the Supreme Court, and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all cases referred to them, both subject to any exceptions and regulations which may be thought advisable; that this appellate jurisdiction does, in no case, abolish the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.

PUBLIUS

The Federalist No. 81, Footnotes

1. Article 3, section 1.

2. This power has been absurdly represented as intended to abolish all the country courts in the several States, which are commonly called inferior courts. But the expressions of the Constitution are, to constitute "tribunals INFERIOR TO THE SUPREME COURT;" and the evident design of the provision is to enable the institution of local courts, subordinate to the Supreme, either in States or larger districts. It is ridiculous to imagine that

country courts were in contemplation.

3. This word is composed of JUS and DICTIO, juris dictio, or a speaking and pronouncing of the law.

4. I hold that the States will have concurrent jurisdiction with the subordinate federal judicatories, in many cases of federal cognizance, as will be explained in my next paper.

THE FEDERALIST NO. 82

A Further View of the Judicial Department
in Reference to Some Miscellaneous Questions
by Alexander Hamilton

THE erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.

Such questions, accordingly, have arisen upon the plan proposed by the convention, and particularly concerning the judiciary department. The principal of these respect the situation of the State courts in regard to those causes which are to be submitted to federal jurisdiction. Is this to be exclusive, or are those courts to possess a concurrent jurisdiction? If the latter, in what relation will they stand to the national tribunals? These are inquiries which we meet with in the mouths of men of sense, and which are certainly entitled to attention.

The principles established in a former paper{1} teach us that the States will retain all preexisting authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former, as well as the latter. And under this impression, I shall lay it

down as a rule, that the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.

The only thing in the proposed Constitution, which wears the appearance of confining the causes of federal cognizance to the federal courts, is contained in this passage: "The JUDICIAL POWER of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress shall from time to time ordain and establish." This might either be construed to signify, that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend; or simply to denote, that the organs of the national judiciary should be one Supreme Courts, and as many subordinate courts as Congress should think proper to appoint; or in other words, that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the State tribunals; and as the first would amount to an alienation of State power by implication, the last appears to me the most natural and the most defensible construction.

But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be peculiar to, the Constitution to be established; for not to allow the State courts a right of jurisdiction in such cases, can hardly be considered as the abridgement of a preexisting authority. I mean not therefore to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision or causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes

to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

Here another question occurs: What relation would subsist between the national and State courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of

national justice and the rules of national decisions. The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions giving appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal courts, instead of allowing their extension to the State Courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

But could an appeal be made to lie from the State courts to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affirmative. The plan of the convention, in the first place, authorizes the national legislature "to constitute tribunals inferior to the Supreme Court."{2} It declares, in the next place, that "the JUDICIAL POWER of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall ordain and establish"; and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them, are that they shall be "inferior to the Supreme Court," and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared.

All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals; and many advantages attending the power of doing it maybe imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the State courts to district courts of the Union.

PUBLIUS